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12258

United States
Court of Appeals
For the Ninth Circuit.

B. H. STAUFFER and STAUFFER SYSTEM,
INC.,

Appellants,

vs.

KATHLEEN EXLEY,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court
for the Southern District of California
Central Division.

FILED
AUG - 5 1949

PAUL P. O'BRIEN,

12258

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

FORREST F. MURRAY,

117 W. 9th St.,
Los Angeles 15, Calif.

HARRIS, KIECH, FOSTER & HARRIS,
FORD HARRIS, Jr.,
JACK BARRY, Jr.,

417 S. Hill St.,
Los Angeles 13, Calif.

For Appellee:

FRANK P. DOHERTY,
WILLIAM R. GALLAGHER,
FRANK W. DOHERTY,

717 Title Insurance Bldg.,
433 S. Spring St.,
Los Angeles 13, Calif.

In the United States District Court Southern District of California, Central Division

Civil Action No. 8977-Y

B. H. STAUFFER and
STAUFFER SYSTEM, INC.,

Plaintifffffs,

vs.

KATHLEEN EXLEY,

Defendant.

COMPLAINT FOR UNFAIR COMPETITION

Plaintiffs Complain of Defendant and Allege:

I.

Plaintiff B. H. Stauffer is a citizen of the State of California, residing in Los Angeles County, California; plaintiff Stauffer System, Inc. is a corporation organized and existing under the laws of the State of California, with its principal place of business at Los Angeles, California.

II.

Upon information and belief, defendant Kathleen Exley is a citizen of the State of California, residing in Los Angeles County, California. [2*]

III.

Jurisdiction is founded on the existence of a question arising under the Statutes of the United States of America and, more particularly, this action arises

* Page numbering appearing at bottom of page of original certified Transcript of Record.

under the Act of July 5, 1946, C. 540, United States Code Annotated, Title 15, Sections 1051 to 1127, inclusive.

IV.

Plaintiff B. H. Stauffer in the year 1932 commenced to research and develop a method of therapeutic treatment, referred to hereinafter as the "Stauffer System," which system is based on the giving of passive exercise through the use of special apparatus, such treatment and said apparatus being designed, originated and developed by B. H. Stauffer, such treatments being sometimes referred to hereinafter as "Stauffer" treatments. Plaintiff B. H. Stauffer continued such research and development work from the year 1932 until the year 1937, expending thereon a substantial portion of his time and substantial amounts of money throughout said period in perfecting and adapting the "Stauffer System" to the needs of the public.

V.

Plaintiff B. H. Stauffer by an agreement effective July 1, 1947 granted to plaintiff Stauffer System, Inc. certain rights which plaintiff, Stauffer System, Inc., now owns and exercises, which said certain rights include the right to use the Stauffer System method of treatments and the right to use the trademark "Stauffer System."

VI.

In the year 1938, B. H. Stauffer commenced to render [3] to the public of the State of California

“Stauffer” treatments under the name of “Stauffer System,” and such treatments have continuously since that time been so rendered to said public by B. H. Stauffer or Stauffer System, Inc., or by persons acting under their direction, supervision, and control as to the nature and quality of the “Stauffer” treatments; in the year 1938, B. H. Stauffer personally opened a place of business at Los Angeles, California, for the purpose of so rendering said treatments. In the latter part of the year 1941, B. H. Stauffer personally opened a further such place of business at Beverly Hills, California, which place of business was operated continuously since its opening by so rendering said “Stauffer” treatments to many members of the public, such place of business having been owned and personally so operated by B. H. Stauffer until the year 1943, at which time he closed the same; many further such places of business have been opened and so operated by others with the express permission and consent of B. H. Stauffer or Stauffer System, Inc., and under license from B. H. Stauffer or Stauffer System, Inc., and subject to their direction, supervision, and control as to the nature and quality of the treatments rendered to the public thereby and prior to and since the acts of defendant complained of herein.

All of such further places of business from their inception have at all times been owned by others than plaintiffs, but the owners thereof have at all times recognized and acquiesced in plaintiffs’ exclusive right to use of the name “Stauffer” and

“Stauffer System” in connection with the rendering of such “Stauffer System” treatments to the public, and have recognized and acquiesced in plaintiffs’ right to control, supervise, and direct the nature and quality of such treatments rendered by them. Plaintiffs have spent large sums of money and a substantial portion of their time in educating and training the operators of said places of business in the rendering of the “Stauffer System” treatments to the public, and spent large sums of money and a substantial portion of their [4] time in supervising and directing the rendering of such treatments to the public by said places of business.

VII.

All of said “Stauffer System” treatments rendered to the public under plaintiffs’ direction, supervision, and control, and said places of business rendering the same, as alleged in Paragraph V hereof, have been extensively advertised and otherwise extensively publicized in the State of California and throughout the United States as “Stauffer Salons” under the name and style of the “Stauffer System” by plaintiffs and by the persons owning and operating said places of business under plaintiffs’ direction, supervision, and control, all of whom have expended large sums of money on such advertising and publicity, all prior to and since May 27, 1946. Such advertising and publicity have consisted, in part, of advertising in newspapers having circulation in this District and outside of this District, of

radio programs and commercials adapted to be heard by the public in California and throughout the United States, and in magazines having national circulation.

VIII.

By reason of the acts of plaintiffs and those persons acting under their direction, supervision, and control, as aforescribed, plaintiffs, prior to the commencement of defendant's acts complained of herein, built up and developed an extensive business throughout this District and elsewhere in the United States in the rendering to the public such "Stauffer" treatments, under the trade name and style of the "Stauffer System," by which trade name they are now known to the public in this District and throughout the United States, [5] and by which designations the public has long identified such treatments as being under plaintiffs' direction, supervision, and control, and by which designations such public has come to identify such treatments and said designations with plaintiffs' business, all since long prior to defendant's acts complained of herein, and plaintiffs have acquired thereby and now own good will of great value in such business and in the said use of such designations and the trade name "Stauffer System," and the name "Stauffer" in connection with the treatments of giving passive exercise, and plaintiffs have acquired and now own the sole and exclusive right to conduct said treatments in the manner originated, developed, and perfected by them as aforesaid, and plaintiffs have ac-

quired and now own the exclusive right to publicize and use the name "Stauffer System" in connection with the rendering to the public of treatments involving the giving of passive exercise and in the use of the name "Stauffer" in connection with reducing systems.

IX.

Since May 27, 1946, defendant has been rendering to the public passive exercise treatments, and wrongfully has used the name "Stauffer" and the phrases "Stauffer Tables" and "Stauffer Slenderizing Tables" in connection with the advertising and giving of said treatments, and wrongfully has copied and used a symbolic female figure similar to that used by plaintiffs to identify their business as a symbol identifying the business of defendant, and wrongfully has copied and used the copied contents of advertising brochures and other advertising of the plaintiffs and thereby is attempting to palm off and pass off upon the public, to defendant's wrongful profit and advantage, imitations of plaintiffs' "Stauffer" treatments, [6] and wrongfully is attempting to confuse the public as to the source of the services rendered by defendant, and wrongfully is seeking to appropriate and is appropriating the advertising heretofore placed and now being placed and paid for by plaintiffs and by those acting under their direction, control, and supervision, and thereby unfairly and unlawfully has secured and is securing to defendant advantages from past advertising and current advertising of plaintiffs and good will laboriously earned by plaintiffs prior to the commence-

ment of defendant's acts complained of herein, and to which said advertising advantage and good will plaintiffs exclusively are entitled and to which defendant knew that plaintiffs exclusively were entitled, all without the authority or consent of plaintiffs or either of them.

X.

Plaintiffs are informed and believe and, therefore, allege that all of the defendant's acts aforesaid, particularly defendant's use of the personal surname "Stauffer," have been conducted with the deliberate and wrongful intention by defendant of misleading the public into believing that defendant's said treatments are supervised, directed, controlled and guaranteed by plaintiffs, and with the intention and for the purpose of appropriating wrongfully to defendant the good will, favorable reputation, business, and trade name rights of plaintiffs, and with the intention and for the purpose of competing unfairly with plaintiffs, and with the intention and for the purpose of palming off and passing off upon the public, to defendant's wrongful profit and advantage, and to plaintiffs' injury, an imitation of the "Stauffer System" treatments of plaintiffs, and with the intention and for the purpose of unlawfully and unfairly securing to defendant's profit the [7] advertising advantages and good will in the personal surname "Stauffer" to which defendant knew that plaintiffs exclusively were entitled and the rendering of treatments which defendant knew that plaintiffs exclusively were en-

titled to render, and to obtain gains and profits to which plaintiffs are exclusively entitled, all with the intention and effect of damaging permanently the value to plaintiffs of their exclusive rights in and to the name "Stauffer" and in and to the name "Stauffer System."

XI.

On or about May 27, 1941, plaintiffs and one Florence Peacock entered into a written agreement, a copy of which is attached hereto and marked "Exhibit A" and made a part hereof by reference thereto. During the existence of said license agreement and with the approval of licensor said license was assigned to defendant herein. Plaintiffs have fully performed all of their obligations under said agreement, exemplified by Exhibit A, including the disclosure in trust and confidence of plaintiffs' system of treatments by the full and complete teaching and instruction by plaintiffs to defendant in the use of plaintiffs' "Stauffer System," theretofore unknown to defendant. The rights of defendant under said agreement expired on May 27th, 1946, and have not been renewed, and defendant has no further rights thereunder. By the terms of said agreement, exemplified by Exhibit A, defendant recognized and acquiesced in the exclusive ownership by plaintiffs of their rights in the "Stauffer System" and plaintiffs' exclusive right to the use of the trade name "Stauffer System," and defendant during the continuation of said agreement at all times continued to recognize and acquiesce in such exclusive ownership

by plaintiffs of their said rights, and defendant still continues to [8] recognize and acquiesce in such exclusive ownership by plaintiffs. By reason thereof, defendant is now estopped to deny plaintiffs' said exclusive ownership of their said rights.

XII.

Plaintiffs have heretofore requested and demanded that defendant discontinue and refrain from her acts complained of as aforesaid, but notwithstanding such request defendant has refused and still refuses to refrain from such acts, and plaintiffs are informed and believe and, therefore, allege that defendant intends to, and will continue to, perform such acts complained of unless enjoined and restrained from so doing.

XIII.

Plaintiffs are informed and believe, and therefore, allege that: if defendant is permitted to continue to perform her acts complained of herein as aforesaid, the public will at all times be deceived, misled, and defrauded into believing that such business wrongfully conducted by the defendant is the business of the plaintiffs, or is directed, controlled, or supervised by plaintiffs, and that the true "Stauffer System" contemplates or authorizes such treatments as provided by the defendant, all of which is, and will continue to be, to the irreparable damage, loss, and injury of the plaintiffs and the public, for which neither plaintiffs nor the public have any

plain, speedy, or adequate remedy at law to avoid or repair such damage, loss, or injury.

XIV.

That the extent of plaintiffs' damage can be ascertained only by an accounting as against the defendant. [9]

Wherefore, plaintiffs pray:

1. That the defendant and all persons acting for defendant as agents or otherwise be perpetually enjoined and restrained from the use of the "Stauffer System," and from the use of the surname "Stauffer" and trade name "Stauffer System," or any name, phrase, or device in any manner resembling or imitating, whether, by sound, appearance, or spelling the surname "Stauffer" and trade name "Stauffer System," and from the doing of the things in this complaint complained of, and from continuing and operating defendant's business in any manner tending to deceive the public or customers of the plaintiffs to the effect that plaintiffs are in any way connected with said business, and from any other act calculated to divert or secure any of the patronage or trade of plaintiffs.

2. That the plaintiffs recover from the defendant their damages for loss of patronage and in addition the profits of defendant arising from the defendant's acts complained of herein, as an accounting shall show plaintiffs entitled to, and that such accounting be had.

3. Costs of suit and for such other and further relief as the Court deems just.

FORREST MURRAY and
HARRIS, KIECH, FOSTER &
HARRIS,

By /s/ FORD HARRIS, JR.,
Attorneys for Plaintiffs.

[Endorsed]: Filed December 10, 1948.

EXHIBIT A

License Agreement

This Agreement, made and entered into on the 27 day of May, 1941, by and between B. H. Stauffer, of the City of Los Angeles, State of California, as Licensor, and Florence Peacock, as Licensee.

Witnesseth:

Whereas, the Licensor is the sole designer and manufacturer of certain tables known as "Stauffer Tables," and is the sole and exclusive originator and owner of a certain system known as the "Stauffer System"; which is a system based on the giving of passive exercise through the use of mechanical apparatus, and

Whereas, the Licensees are desirous of obtaining the rights to use the apparatus and name "Stauffer System" on the conditions hereinafter stated, limited however, to the following territory, to wit, bounded on the West by Crenshaw Blvd., on the North by Santa Barbara Ave., on the South by Florence Ave., and on the East by Main St.

All errors and conflicts in and between the lines

of the territory above described and those of adjacent Licensees shall be submitted to and fixed by Licensor.

Whereas, the Licensees recognize the ownership of the said properties and the validity of the rights in the "Stauffer System" by the Licensor; Now Therefore,

For and in consideration of the mutual benefits and promises from one to the other, and other valuable consideration. It Is Agreed:

(1) That the Licensor hereby exclusively assigns to the Licensees for a period of five (5) years commencing from the date of the execution of this Agreement, and upon [11] the conditions hereinafter set forth, the sole and exclusive license to use the apparatus and name "Stauffer System" commercially within the territory hereinbefore described. Nothing Herein, However, Shall Give the Licensees Any Interest in the Name "Stauffer System," Except the Right of Usage in the Territory Herein Described.

(2) The Licensor hereby sells and transfers to Licensees herein, Three Stauffer Tables, Numbers 194-3, 261-2 and 155-1, at Three Hundred and Fifty Dollars (\$350.00) each, receipt of \$250.00 being hereby acknowledged. That the Licensor agrees to deliver additional Stauffer Tables to the Licensees upon written request of the Licensees and upon payment of Three hundred and fifty dollars (\$350.00) per table, to be made as early as possible from the receipt of the request and as manu-

facturing conditions will permit; and in connection therewith the Licensor will, upon request of the Licensees, instruct any operator in their employ for a reasonable period of time as to the proper methods to be used in giving the Stauffer System treatments, and Licensees agrees to give the said Stauffer System treatments according to the methods specified by the Licensor herein and not otherwise, and the failure of the Licensees to give the treatments as specified by the Licensor shall be deemed a violation of this Agreement. and the Licensor shall be the sole judge as to whether this condition is being performed and shall have the option to terminate the same by written notice addressed to the last known place of business of the Licensees. [Initialed] F. P., W. R. G., B. H. S.

(3) The Licensor will furnish the Licensees with a written schedule of prices to be charged customers for the Stauffer System treatments, and the Licensees agree to maintain the said written schedule as furnished by the Licensor. [12]

(4) For the term of this contract, Licensor hereby assigns to Licensees the sole and exclusive license to use the name "Stauffer System" in the territory hereinbefore described. The Licensor reserves the right to sell the Stauffer Table known as Number 1 to Doctors within said territory for therapeutic purposes, or any and all Stauffer Tables to hospitals for orthopedic or therapeutic purposes only, or individuals for private use only.

(5) Licensees, at their own cost and expense, agree to do a reasonable amount of advertising for the purpose of developing the said business, said advertising shall at all times conform to Federal and State laws.

(6) Licensees agree to refrain during the terms of this agreement, from using any system or apparatus, either directly or indirectly, which is competitive or can be used unfairly, with the product or system of the Licensor. The Licensor shall be the exclusive judge, after notice and hearing, whether or not any system or apparatus used by Licensees comes within this provision.

(7) That the terms and conditions of this Agreement are deemed to be the essence thereof and time likewise is made the essence thereof.

(8) It is further agreed that neither this contract, nor any part of the territory herein described, shall be assigned, transferred or conveyed, in whole or in part, without the written consent of the Licensor.

(9) Should the holder of this License, or any business operating thereunder, for any reason whatsoever, lose possession of the Stauffer Tables and permit said tables to remain out of Licensees' possession for a period of ten (10) days, this Agreement, and all rights thereunder, automatically terminate. Should the holder of this License, or the business operating [13] thereunder, fail, become

bankrupt, or be placed in the hands of a receiver, the right to use the name "Stauffer System" automatically terminates; and it likewise automatically terminates in case of proper and lawful proceedings by, or against the said holder under any section of the Federal Bankruptcy Act, or in case said holder of License is a partnership and said partnership is dissolved.

(10) It is expressly agreed and understood that the Licensees shall never attempt to use or pledge the credit of the Licensor for any obligations, and that the Licensor shall never be liable for any of the debts, obligations or torts of the Licensees, their agents, servants and employees, and in connection therewith the Licensees agree to maintain casualty insurance in a sum not less than Five thousand dollars (\$5000.00), said insurance to be in full force and effect during all the time the Licensees are in possession of the Stauffer System Tables, or are giving the Stauffer System treatments.

(11) In the event of the termination of this Agreement for any reason, the Licensees agree they will not engage in a business predicated upon the Principle of the Stauffer System, within the boundaries of the United States for a period of two (2) years after such termination.

(12) At the expiration of the original five (5) years the franchise may be extended from year to year for a period not to exceed five (5) years.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

/s/ WILLIAM R. GALLAGHER,

Witness.

/s/ B. H. STAUFFER,

Licensor.

/s/ FLORENCE PEACOCK,

Licensee.

.....,

Licensee.

[Endorsed]: Filed Dec. 10, 1948. [14]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant Kathleen Exley Gallagher, sued and served herein as Kathleen Exley, and answering the complaint herein admits, denies and alleges as follows:

I.

Answering the allegations contained in paragraphs I, IV, V, VI, VII, and VIII of said complaint this defendant has no information or belief sufficient to enable her to answer the allegations contained in said paragraphs and for want of such information and belief and basing her denial upon that ground denies generally and specifically each and every allegation contained in each and all of said paragraphs and the whole thereof.

II.

Answering the allegations contained in paragraph III of said complaint, this defendant denies generally and specifically [15] each and every allegation contained in said paragraph and the whole thereof.

III.

Answering the allegations contained in paragraph IX, defendant denies generally and specifically each and every allegation contained in said paragraph and the whole thereof except as hereinafter alleged.

Further answering said paragraph, this answering defendant alleges that she is now and has been since on or about the 1st day of May, 1942, the owner of and entitled to the possession of five "Stauffer Tables"; that said "Stauffer Tables" were sold and delivered by plaintiff B. H. Stauffer to Florence Peacock and this defendant, as hereinafter alleged; that on or about the 1st day of October, 1941, this defendant acquired the interest of said Florence Peacock in and to said "Stauffer Tables" and as hereinbefore alleged this defendant is now and has since on or about the 1st day of May, 1942, been the owner of and entitled to the possession of said five "Stauffer Tables"; that this defendant as such owner of said five "Stauffer Tables" has from time to time advertised the said phrase "Stauffer Tables" and has made known to the public that she owned and possessed said five "Stauffer Tables" and that the same were available for use by the

public in connection with the operation and conduct of a reducing salon owned by this defendant and operated by her under the trade name of "Sterling Slenderizing System," all as herein-after more particularly alleged.

IV.

Answering the allegations contained in paragraph X of said complaint, this defendant denies generally and specifically each and every allegation contained in said paragraph and the whole thereof. [16]

V.

Answering the allegations contained in paragraph XI of said complaint, this defendant denies generally and specifically each and every allegation contained in said paragraph and the whole thereof.

Further answering said paragraph, this defendant admits that an agreement was entered into with plaintiff B. H. Stauffer in the form attached to the complaint marked Exhibit A and that said agreement expired by its terms on May 27, 1946, and has not been renewed. This defendant further alleges that the interest of Florence Peacock in said agreement and in and to the "Stauffer Tables" referred to therein, was assigned and transferred to this defendant with the knowledge, consent, and permission of said B. H. Stauffer on or about the 1st day of October, 1941, and that this defendant thereby succeeded all of the rights of said Florence Peacock in and to said agreement and said "Stauffer Tables."

VI.

Answering the allegations contained in paragraphs XII, XIII, and XIV, this defendant denies generally and specifically each and every allegation contained in said paragraphs and the whole thereof.

VII.

Further answering said complaint this defendant alleges that at the time of the execution of said agreement attached to the complaint marked Exhibit "A," the said B. H. Stauffer sold and delivered to said Florence Peacock three "Stauffer Tables" referred to and described in said agreement, for the sum of \$350.00 each; thereafter said Florence Peacock purchased an additional "Stauffer Table" from said plaintiff B. H. Stauffer; that this defendant with the knowledge, consent, and permission of said plaintiff B. H. Stauffer acquired the interest of said [17] Florence Peacock in and to said four "Stauffer Tables" and ever since the 1st day of October, 1941, has been and is now the owner of said four "Stauffer Tables"; that on or about the 1st day of May, 1942, said plaintiff B. H. Stauffer sold and delivered to this defendant an additional "Stauffer Table"; that as hereinbefore alleged this defendant now owns and possesses, and ever since said 1st day of May, 1942, has owned and possessed a total of five "Stauffer Tables."

VIII.

That said five "Stauffer Tables" were purchased from plaintiff B. H. Stauffer under five separate

contracts of conditional sale, in each of which said contracts the said "Stauffer Tables" were referred to in the following manner:

"Conditional Sale Contract

"The undersigned Seller hereby sells and the undersigned Purchaser hereby purchases subject to the terms and conditions hereinafter set forth, the following described property, to-wit:

"Item: 3.

Quantity: 1.

Make: Stauffer.

Description of Equipment: Table.

Model: 3.

Serial Number: 194-3.

Cabinet or Motor Number:

for the following payments in lawful money of the United States of America":

That each of said five contracts of conditional sale were signed by plaintiff B. H. Stauffer as seller and were identical, with the exception of the model and serial number of [18] the tables and the dates and amounts of payments.

IX.

That several months prior to the expiration of the said agreement attached to the said complaint marked Exhibit "A," and on or about the 1st day of February, 1946, this defendant ceased to advertise or represent herself to the public as "Stauffer System" and commenced to advertise her business as "Sterling Slenderizing System." That this

defendant was formerly known as and her legal name was Kathleen Sterling.

That this defendant operates and conducts a reducing salon in the area and section of the City of Los Angeles known as Leimert Park under the name of "Sterling Slenderizing System," and in connection therewith uses various types of tables and equipment, including a "Tammen Table," "Multiple Oscillation" equipment, and "Stauffer Tables"; that this defendant utilizes and displays on the building in which she conducts her salon a large sign approximately twelve feet long with large eight-inch lettering painted red containing the words "Sterling System"; that this defendant also displays in connection with her said business the following additional signs: a smaller sign containing the words "Stauffer & Tammen Tables"; a sign at right angles to the store front have two surfaces containing the words "Sterling Slenderizing"; another sign at right angles to the store front containing the words "Stauffer & Tammen Tables"; another sign at right angles to the store front containing the words "Sterling Slenderizing System"; and another sign on the window of the store containing the words "Sterling Slenderizing System."

X.

That all of this defendant's advertising emphasizes and stresses in large type the name "Sterling Slenderizing System"; that in such advertising the words "Stauffer Tables" [19] and "Tam-

men Table" and "Multiple Oscillation" are used in a subordinate and inconspicuous manner and in such a way as to feature, stress, and place emphasis on this defendant's trade name of "Sterling Slenderizing System"; that several months prior to the expiration of said agreement marked Exhibit "A" and commencing on or about the 1st day of February, 1946, and continuing up to the present time, this defendant has not advertised "Stauffer System" nor has she represented or held herself out to the public by advertising or otherwise as "Stauffer System."

XI.

That the salons operated under license from the plaintiffs display a unique and distinctive sign in script lettering containing the words "Authorized Stauffer System." That said sign is common to all of said salons licensed by the plaintiffs and is readily recognized and identified by the public generally as being a salon utilizing "Stauffer System"; that the said salon operators, licensed by plaintiffs do not perform or render any services other than "Stauffer System" and do not use any tables or equipment other than those manufactured, furnished, or provided by plaintiffs.

XII.

That this defendant, as heretofore alleged, displays a total of seven signs in connection with the conduct of her salon; that in addition to a reducing system, this defendant's salon also contains

a beauty parlor, a department for electrolysis and a special department for facials; that by reason of the size, number, and nature of the signs displayed by this defendant and the great difference between said signs and the said unique and distinctive sign displayed by the salons licensed by plaintiffs and by further reason of emphasizing by this defendant of the name "Sterling Slenderizing System" in her advertising, as aforesaid, there is no opportunity or likelihood of the general [20] public mistaking or confusing the salon of this defendant and the services furnished by her for a salon licensed by plaintiffs; that this defendant has taken every reasonable precaution to prevent the public from being misled or deceived into mistaking or confusing her salon and the said services furnished by her as being a salon licensed by plaintiffs using "Stauffer System."

XIII.

That during the time the said agreement attached to the complaint marked Exhibit "A" was in effect, this answering defendant developed a substantial good will in the reducing and slenderizing business in the said area and section of the city of Los Angeles known as Leimert Park; that the patronage which this defendant enjoys is due to her own industry, personal efforts and reputation in the said community known as Leimert Park.

That several months prior to the expiration of the said agreement marked Exhibit "A," plaintiff B. H. Stauffer submitted to this defendant a

proposed further agreement wherein the said plaintiff B. H. Stauffer offered to assign to this defendant the exclusive right to use the name "Stauffer System" in said Leimert Park area for a period of five years commencing May 27, 1946. That said proposed agreement differed from the said agreement attached to the complaint marked Exhibit "A" in that in said proposed agreement, the "Stauffer Tables" therein referred to, were to be leased and rented to this defendant rather than sold and delivered outright as provided in said Exhibit "A"; that said proposed agreement further provided for the payment of a rental of \$7.50 a month for each "Stauffer Table" used in the said territory covered by said agreement; that at the time said plaintiff B. H. Stauffer submitted said proposed agreement to this defendant, he requested and demanded that this defendant pay to him a rental of \$7.50 for each of the said [21] five "Stauffer Tables" theretofore purchased, acquired, and owned by her. That this defendant declined to pay said rental on the said five tables belonging to her and the said proposed agreement was never entered into; that this defendant continued to operate a reducing salon in the said Leimert Park area under the trade name of "Sterling Slenderizing System" as aforesaid.

XIV.

That the advertisement of "Stauffer Tables" in connection with the operation of a reducing salon by this defendant under the trade name of "Sterling Slenderizing System" is a truthful and honest state-

ment of the origin of said "Stauffer Tables"; that in so advertising said tables in an inconspicuous and subordinate manner in connection with the conduct of her said "Sterling Slenderizing System" this defendant honestly and truthfully represented and does represent to the public that she owned and possessed and was and is entitled to use an article or articles which she had theretofore bought and paid for, namely, the said five "Stauffer Tables."

For a Further, Separate, and First Affirmative Defense to the cause of action set forth in the complaint, this defendant alleges as follows:

I.

That said plaintiffs, as appears from the allegations contained in the complaint, are engaged in interstate commerce, transacting business in California and elsewhere throughout the United States; that the said agreement attached to the complaint marked Exhibit "A" contains, in part, the following:

"(3) The Licensor will furnish the Licensees with a written schedule of prices to be charged customers for the Stauffer System treatments, and the Licensees agree to maintain the said written schedule as furnished [22] by the Licensor."

This defendant is informed and believes and therefore alleges that similar clauses are contained in all of the licenses and franchises granted by plaintiffs to licensees doing business in this State and elsewhere throughout the United States. That said

clause provides for price maintenance and is illegal and void and contrary to the Sherman Act (1890 15 USCA, section 1), and the Clayton Act (15 USCA, section 14). That said agreement attached to the complaint marked Exhibit "A" and each and every license and franchise issued by plaintiffs containing a price maintenance clause is in restraint of trade and contrary to said statutes above referred to.

For a Further, Separate, and Second Affirmative Defense to the cause of action set forth in the complaint, this defendant alleges as follows:

I.

That the said agreement attached to the complaint marked Exhibit "A" contains, in part, the following:

"(3) The Licensor will furnish the Licensees with a written schedule of prices to be charged customers for the Stauffer System treatments, and the Licensees agree to maintain the said written schedule as furnished by the Licensor."

This defendant is informed and believes and therefore alleges that similar clauses are contained in all of the licenses and franchises granted by plaintiffs to licensees doing business in this State. That said clause provides for price maintenance and is illegal and void and contrary to the Cartwright Act (Stats. 1907 p. 984, as amended by Stats. 1909, p. 593; Deering's Gen. Laws, 1931, Act 8702). That said agreement attached to the complaint marked Exhibit "A" and each and every license and [23]

franchise issued by plaintiffs in this State containing a price maintenance clause is in restraint of trade and contrary to said Cartwright Act above referred to.

For a Further, Separate, and Third Affirmative Defense to the cause of action set forth in the complaint, this defendant alleges as follows:

I.

That the Court lacks jurisdiction of the subject matter of the within action.

Wherefore, this answering defendant prays that the action be dismissed and that plaintiffs have no relief whatsoever, and that this defendant have her costs incurred herein, and for such other and further relief as seems meet and just in the premises.

Dated this 7th day of January, 1949.

FRANK P. DOHERTY,
WILLIAM R. GALLAGHER,
and
FRANK W. DOHERTY.

By /s/ WILLIAM R. GALLAGHER.

State of California,
County of Los Angeles—ss.

Kathleen Exley Gallagher, sued and served herein as Kathleen Exley, being by me first duly sworn, deposes and says: that she is the defendant in the above-entitled matter; that she has read the foregoing Answer and knows the contents thereof; and that the same is true of her own knowledge, except

as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

/s/ KATHLEEN EXLEY
GALLAGHER.

Subscribed and sworn to before me this 6th day of January, 1949.

[Seal] /s/ FRANK W. DOHERTY,
Notary Public in and for Said County and State.
My Commission Expires June 13, 1952.

Received copy of the within Answer this 7th day of January, 1949.

HARRIS, KIECH,
FOSTER & HARRIS,
/s/ JACK BARRY, JR.
Attorneys for Plaintiff.

[Endorsed]: Filed January 10, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Findings of Fact

1. Plaintiff, Stauffer System, Inc., is a corporation of the State of California and is a citizen and inhabitant of said state and Plaintiff B. H. Stauffer is a citizen and inhabitant of said state.

2. Plaintiffs, Stauffer System, Inc., and B. H. Stauffer do business in the State of California and

in other states of the United States and are engaged in interstate commerce and in commerce within the meaning of the Trade-Mark Act of July 5, 1946, C. 540, United States Code Annotated, Title 15, Sections 1051 to 1127, inclusive.

3. Plaintiff B. H. Stauffer owns and plaintiff Stauffer System, Inc. uses the trade-mark "Stauffer System" in commerce.

4. The trade-mark "Stauffer System" owned by Plaintiff B. H. Stauffer and used in commerce by Plaintiff Stauffer System, Inc. has not been registered in the United States Patent Office. [27]

5. Defendant Kathleen Exley is a citizen and inhabitant of the State of California.

6. The action herein is a simple action for unfair competition.

7. There is joined to the action for unfair competition no substantial and related claim under the copyright, patent or trade-mark laws.

8. There has been a separate trial of the issue of jurisdiction herein.

Conclusions of Law

1. There is no diversity of citizenship between and among plaintiffs and defendant.

2. The Trade-Mark Act of July 5, 1946 does not confer original jurisdiction upon the district courts of the United States in actions for unfair competition in the absence of diversity of citizenship of the parties where there is no substantial and related claim under the copyright, patent or trade-mark laws joined to such actions.

3. This court does not have jurisdiction of the action herein because of the lack of diversity of citizenship of the parties and because there is no substantial and related claim under the copyright, patent or trade-mark laws joined to said action.

Dated: At Los Angeles, California, this 11th day of April, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

Approved As To Form, this 5th day of April, 1949.

FRANK P. DOHERTY,
WILLIAM R. GALLAGHER,
FRANK W. DOHERTY,
By /s/ WILLIAM R. GALLAGHER,
Attorneys for Defendant.

Received copy of the within Findings of Fact, etc., this 31st day of March, 1949.

WILLIAM R. GALLAGHER,
Attorney for Defendant.

[Endorsed]: Filed April 11, 1949.

United States District Court, Southern District of
California, Central Division
No. 8977-Y Civil

B. H. STAUFFER and STAUFFER SYSTEM,
INC.,

Plaintiffs,

vs.

KATHLEEN EXLEY,

Defendant.

JUDGMENT

In accordance with, and for the reasons set forth
in the Findings of Fact and Conclusions of Law
signed and filed herewith in the above-entitled cause,

It Is Ordered, Adjudged and Decreed that the
above-entitled cause is hereby dismissed for lack of
jurisdiction.

Dated: April 11, 1949. .

/s/ LEON R. YANKWICH,
Judge.

Judgment entered April 12, 1949.

Docketed April 12, 1949.

[Endorsed]: Filed April 11, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that B. H. Stauffer and
Stauffer System, Inc., plaintiffs above named, ap-
peal to the Court of Appeals for the Ninth Circuit

from Interlocutory Judgment entered in this action on April 12, 1949.

Dated: At Los Angeles, California, this 29th day of April, 1949.

HARRIS, KIECH,
FOSTER & HARRIS,
FORD HARRIS, JR.,
JACK BARRY, JR.,
/s/ FORD HARRIS, JR.,
Attorneys for Plaintiffs.

[Endorsed]: Filed April 29, 1949.

[Title of District Court and Cause.]

STIPULATION RE COST BOND
ON APPEALS

Whereas, plaintiffs in the above-entitled action on April 29, 1949, filed a Notice of Appeal therein,

It Is Hereby Stipulated by and between the parties hereto, through their respective attorneys, that plaintiffs need file no cost bond under Rule 73(c) of the Rules of Civil Procedure in said appeal. This stipulation may, but need not be filed.

Dated this 10th day of May, 1949.

FRANK P. DOHERTY &
WILLIAM R. GALLAGHER,
/s/ FRANK W. DOHERTY,
Attorneys for Defendant.

HARRIS, KIECH,
FOSTER & HARRIS,
By /s/ FORD HARRIS, JR.,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 10, 1949.

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS OF
APPEAL UNDER RULE 75(a)

The Trial Court erred in holding:

1. That the Trade-Mark Act of July 5, 1946, does not confer upon the District Courts of the United States original jurisdiction in actions for unfair competition where there is no substantial and related claim under the copyright, patent or trade-mark laws joined to such an action.

2. That the Trade-Mark Act of July 5, 1946, does not confer upon the District Courts of the United States original jurisdiction in actions for unfair competition irrespective of the fact that the parties are inhabitants of the same state.

HARRIS, KIECH,
FOSTER & HARRIS,
By /s/ FORD HARRIS, JR.,
Attorneys for Plaintiffs-
Appellants.

Dated: May 10, 1949.

[Endorsed]: Filed May 10, 1949.

PLAINTIFFS'-APPELLANTS' DESIGNATION
OF PORTION OF RECORD ON APPEAL
PURSUANT TO RULE 75(a)

The Clerk of this Court, in conformance with Rule 75 of Federal Rules of Civil Procedure, is

requested to transmit to the Clerk of the Court of Appeals for the Ninth Circuit, the following designated portions of the record:

1. The Complaint for unfair competition filed December 10, 1948.
2. Answer to Complaint filed January 10, 1949.
3. Findings of Fact and Conclusions of Law filed April 11, 1949.
4. Judgment entered April 12, 1949.
5. Notice of Appeal filed April 29, 1949.
6. Stipulation that no bond for costs be filed.
7. Concise Statement of Points on Appeal under Rule 75(a).
8. This Designation.

Dated this 10th day of May, 1949.

HARRIS, KIECH,

FOSTER & HARRIS,

By /s/ FORD HARRIS, JR.,

Attorneys for Plaintiffs-
Appellants.

Received copy this 10th day of May, 1949.

FRANK P. DOHERTY.

[Endorsed]: Filed May 10, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 35, inclusive, contain the original Complaint for Unfair Competition; Answer; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Stipulation re Cost Bond on Appeal; Statement of Points on Appeal and Designation of Record on Appeal which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 3rd day of June, A.D. 1949.

EDMUND L. SMITH,
Clerk,

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12258 United States Court of Appeals for the Ninth Circuit. B. H. Stauffer and Stauffer System, Inc., Appellants. vs. Kathleen Exley, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 6, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12258

B. H. STAUFFER and STAUFFER SYSTEM,
INC.,

Appellants,

vs.

KATHLEEN EXLEY,

Appellee.

DESIGNATION OF APPELLANTS

Appellants hereby adopt the Plaintiffs'-Appellants' Designation of Portions of Record on Appeal, filed in the District Court, and already a part of the record on appeal herein, as their designation on appeal of the record to be printed.

Dated: At Los Angeles, California, this 7th day of July, 1949.

HARRIS, KIECH,
FOSTER & HARRIS,
FORD HARRIS, JR.,
JACK BARRY, JR.,

By /s/ FORD HARRIS, JR.,

Attorneys for Appellants.

Received copy of the within Designation of Appellants, this 8th day of July, 1949.

By /s/ WILLIAM R. GALLAGHER,
Attorneys for Appellee.

[Endorsed]: Filed July 11, 1949.

[Title of Court of Appeals and Cause.]

NOTICE OF ADOPTION OF
STATEMENTS OF POINTS

Appellants hereby adopt as their statement of points under Rule 19(6) on their appeal the Concise Statement of Points on Appeal under Rule 75(a) appearing in the transcript of the record certified by the Clerk of the District Court and filed herein.

Dated: At Los Angeles, California, this 7th day of July, 1949.

HARRIS, KIECH,
FOSTER & HARRIS,
FORD HARRIS, JR.,
JACK BARRY, JR.,

By /s/ FORD HARRIS, JR.,
Attorneys for Appellants.

Received copy of the within Notice of Adoption of Statement of Points, this 8th day of July, 1949.

By /s/ WILLIAM R. GALLAGHER,
Attorneys for Appellee.

[Endorsed]: Filed July 11, 1949.

No. 12258.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

B. H. STAUFFER and STAUFFER SYSTEM, INC.,

Appellants,

vs.

KATHLEEN EXLEY,

Appellee.

OPENING BRIEF FOR PLAINTIFFS- APPELLANTS.

FORREST F. MURRAY,

HARRIS, KIECH, FOSTER & HARRIS,

FORD HARRIS, JR.,

JACK BARRY, JR.,

417 South Hill Street, Los Angeles 13.

Attorneys for Plaintiffs-Appellants.

FILED
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No. 12258.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

B. H. STAUFFER and STAUFFER SYSTEM, INC.,

Appellants,

vs.

KATHLEEN EXLEY,

Appellee.

**OPENING BRIEF FOR PLAINTIFFS-
APPELLANTS.**

I.

STATEMENT OF JURISDICTION.

Jurisdiction of the District Court is founded upon the Trade-Mark Act of July 5, 1946 (Public Law 489, 79th Congress, Chapter 540, 2nd Session, 15 U. S. C. 1051-1127). This is popularly denominated the Lanham Act.

Jurisdiction of the District Court is therefore founded specifically upon Section 39 of the Lanham Act (15 U. S. C. 1121) and 28 U. S. C. 1337. Jurisdiction of this court is founded upon the same section (15 U. S. C. 1121) and upon 28 U. S. C. 1291.

II.

STATEMENT OF THE CASE.

A. The Issue.

This case presents a new and novel question of law, hitherto undecided, so far as we can determine. Decision of this Court on this question may have far-reaching and important consequences.

The question of law presented by this case is:

Under the new Federal Trade-Mark Act (Public Law 489, 79th Congress, Chapter 540, 2nd Session, 15 U. S. C. 1051-1127), do the Courts of the United States have jurisdiction in simple actions for unfair competition between a plaintiff engaged in "commerce" and a defendant not so engaged, in the absence of diversity of citizenship between the parties, and where such action is not related to a substantial claim for patent, trade-mark or copyright infringement?

B. The Facts.

(1) Both plaintiffs and defendant are citizens of the State of California [Complaint, Tr. 2; Answer, Tr. 17; and Findings of Fact, Tr. 29, 30]; there is no diversity of citizenship [Conclusions of Law, Tr. 30].

(2) Plaintiffs are engaged in "commerce," within the meaning of the Lanham Act [Findings of Fact, Tr. 30].

(3) Defendant is charged with unfair competition with plaintiffs [Complaint, Tr. 7].

(4) The action was filed in the Southern District of California, Central Division.

(5) A separate trial was had upon the question of jurisdiction of the District Court to entertain the action [Tr. 30], and the District Court dismissed the action upon the ground that it had no jurisdiction [Tr. 32].

III.

SPECIFICATION OF ERRORS.

The asserted errors of the United States District Court that are relied upon by the plaintiff-appellants are as follows:

(1) The District Court erred in Conclusion of Law 2 in holding:

“The Trade-Mark Act of July 5, 1946 does not confer original jurisdiction upon the district courts of the United States in actions for unfair competition in the absence of diversity of citizenship of the parties where there is no substantial and related claim under the copyright, patent or trade-mark laws joined to such actions.” [Tr. 30.]

(2) The District Court erred in Conclusion of Law 3 in holding:

“This court does not have jurisdiction of the action herein because of the lack of diversity of citizenship of the parties and because there is no substantial and related claim under the copyright, patent or trade-mark laws joined to said action.” [Tr. 31.]

(3) The District Court erred in its Judgment in ordering, adjudging and decreeing that the action be dismissed for lack of jurisdiction.

IV.

SUMMARY OF ARGUMENT.

A. UNDER THE LANHAM TRADE-MARK ACT THE FEDERAL DISTRICT COURT HAS ORIGINAL JURISDICTION OF AN ACTION FOR UNFAIR COMPETITION INVOLVING GOODS AND SERVICES IN INTERSTATE COMMERCE.

B. EMINENT UNFAIR COMPETITION AUTHORITIES RESPONSIBLE FOR THE DRAFTING AND ENACTMENT OF THE LANHAM ACT INTERPRET IT TO GIVE ORIGINAL JURISDICTION OF SIMPLE ACTIONS IN UNFAIR COMPETITION TO THE UNITED STATES DISTRICT COURTS.

C. RULES OF STATUTORY CONSTRUCTION AND INTERPRETATION REQUIRE THE DECISION THAT UNITED STATES COURTS ARE REQUIRED TO TAKE JURISDICTION OF SIMPLE ACTIONS IN UNFAIR COMPETITION.

D. CONGRESS INTENDED TO REQUIRE UNITED STATES DISTRICT COURTS TO HEAR AND DECIDE ACTIONS FOR UNFAIR COMPETITION SIMILAR TO THE INSTANT CAUSE.

V.

ARGUMENT.

A. Under the Lanham Trade-Mark Act the Federal District Court Has Original Jurisdiction of an Action for Unfair Competition Involving Goods and Services in Interstate Commerce.

The Lanham Trade-Mark Act (Public Law 489, 79th Congress, Chapter 540, 2nd Session; 15 U. S. C. 1051-1127), effective July 5, 1947, is not only an act designed to protect trade-marks, but also has for its purpose the implementation of certain international treaties¹ or conventions to which the United States is a party. The act is entitled:

“An Act to provide for the registration and *protection* of trade-marks used in commerce, *to carry out the provisions of certain international conventions, and for other purposes.*” (Emphasis ours.)

These treaties implemented by the Lanham Act define unfair competition and assure in every signatory country to the nationals of every other country “effective protection against unfair competition.” *They represent the Supreme Law of the Land* (Constitution, Article VI, Clause 2). The Lanham Act provides the machinery in Title IX, “International Conventions,” for carrying out the provisions of these treaties. Specifically, it provides for invoking the same remedies provided in the act for infringement of registered trade-marks for the repression of unfair competition. Such remedies, which include suit in the United States Courts, are available to nationals of countries signatories to these treaties and to citizens and residents of the United States.

The Lanham Act, therefore, by incorporating various treaties relating to unfair competition and providing for their enforcement in the Federal Court, establishes a federal code of unfair competition and a federal cause of action to enforce it.

The particular treaties which are implemented by the Lanham Act are named in Section 44(b) [15 U. S. C. 1126(b)], which provides as follows:

“Persons who are nationals of, domiciled in, or have a *bona fide* and effective business or commercial establishment in any foreign country, which is a party to (1) the International Convention for the Protection of Industrial Property, signed at Paris on March 20, 1883; or (2) the General Inter-American Convention for Trade Mark and Commercial Protection signed at Washington on February 20, 1929; or (3) any other convention or treaty relating to trade-marks, trade or commercial names, or the repression of unfair competition to which the United States is a party, shall be entitled to the benefits and subject to the provisions of this Act to the extent and under the conditions essential to give effect to any such conventions and treaties so long as the United States shall continue to be a party thereto, except as provided in the following paragraphs of this section.”

This section clearly gives to foreign nationals all rights and benefits under the act as are required to enforce the International Convention for the Protection of Industrial Property and the General Inter-American Convention for Trade Mark and Commercial Protection. Both of these treaties relate in part to the repression of unfair competi-

tion. Thus in the former, which is commonly known as the Paris Convention, it is provided in Article 10 BIS:

“1. The countries *of the Union* are bound to assure to nationals of countries of the Union an effective protection against unfair competition.

“2. Every act of competition contrary to honest practice in industrial or commercial matters constitutes an act of unfair competition.

“3. The following particularly are to be forbidden:

“1° All acts whatsoever of a nature to create confusion by no matter what means with the *establishment*, the goods, *or the services* of the competitor;

“2° False allegations in the course of trade of a nature to discredit *the establishment*, the goods *or the services* of a competitor.” (Italics added.)

The Inter-American Convention states in Article 20:

“Every act or deed contrary to commercial good faith or to the normal and honorable development of industrial or business activities shall be considered as unfair competition and, therefore, unjust and prohibited.”

Article 21 of this Convention lists in detail the various acts which are declared to be acts of unfair competition.

The Lanham Act in Section 44(h) [15 U. S. C. 1126(h)] specifically provides that the nationals of countries who are parties to these conventions shall be protected against unfair competition under the remedies provided in the act. This section reads as follows:

“Any person designated in paragraph (b) of this section as entitled to the benefits and subject to the provisions of this Act shall be entitled to effective

protection against unfair competition, and the remedies provided herein for infringement of marks shall be available so far as they may be appropriate in repressing acts of unfair competition."

Effective protection against the acts of unfair competition set forth in these treaties is thus assured to foreigners by the remedies afforded under the Lanham Act. These treaties guarantee the same protection to American nationals in foreign countries.

American nationals may not have less rights at home than they have abroad or less rights at home than foreigners. In recognition of this fact, Congress has provided in Section 44(i) [15 U. S. C. 1126(i)] of the act:

"Citizens or residents of the United States shall have the same benefits as are granted by this section to persons described in paragraph (b) hereof."

The sum total of these sections 44(b), (h), and (i) is to provide citizens or residents of the United States protection against unfair competition as defined in the various treaties to which the United States is a party by the same remedies as are given under the act for the infringement of trade-marks. Thus an action for unfair competition is now an action arising under the Lanham Act.

Title X, Section 45 of the act (15 U. S. C. 1127), entitled "*Construction and Definitions*" declares the intention of Congress and states in part as follows:

"The intent of this Act is to regulate commerce within the control of Congress by making actionable

the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; *to protect persons engaged in such commerce against unfair competition*, to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade-names, and unfair competition entered into between the United States and foreign nations.” (Italics added.)

Section 39 (15 U. S. C. 1121) of the act provides as follows:

“The district and territorial courts of the United States shall have original jurisdiction, the circuit courts of appeals of the United States and the United States Court of Appeals for the District of Columbia shall have appellate jurisdiction, of all actions arising under this Act, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties.”

The conclusion must therefore be reached that, since an action for unfair competition is an action arising under the Lanham Act, the Federal Court has original jurisdiction thereof.

This result is at present apparently unsupported by any case citations due to the short time that has elapsed since the Lanham Act has been in effect.

B. Eminent Unfair Competition Authorities Responsible for the Drafting and Enactment of the Lanham Act Interpret It to Give Original Jurisdiction of Simple Actions in Unfair Competition to the United States District Courts.

DAPHNE ROBERT.

The provisions of the Lanham Act are most clearly discussed and effectively analyzed in *The New Trade-Mark Manual*, by Daphne Robert (1947). The author undertakes a detailed discussion, concluding as follows:

“It is clearly apparent that an action for unfair competition is an action ‘arising under the Act,’ and therefore jurisdiction is in the Federal courts, irrespective of diversity or lack of diversity of citizenship. The new Act makes an action for unfair competition relief a statutory right of action and protection will be granted under the Federal law and not limited to the common law of the States.” (p. 177.)

After setting forth the relevant portions of the International Conventions heretofore quoted in part, the author continues:

“It is apparent from the cases cited elsewhere that, for the most part, these acts have been enjoined by the Courts under the principles of the common law. But dependence on the State laws is no longer necessary. Under the new Act, a Federal forum is provided and a yardstick is available for uniform determination of what constitutes ‘unfair competition.’ Somewhat indirectly, but nevertheless effectively, a Federal ‘code of unfair competition’ is thus incorporated into our law.” (p. 180.)

EDWARD S. ROGERS.

Mr. Edward S. Rogers, noted trade-mark authority and author of the earliest standard reference on unfair competition, writes on this point at some length in the introduction to *The New Trade-Mark Manual* (*supra*). After quoting from the Lanham Act and the Conventions, this is said:

“Section 39 of the Lanham Act provides that the Federal Courts shall have original jurisdiction of all actions arising under the Act, without regard to the amount in controversy or to the diversity or lack of diversity of the citizenship of the parties.

“I suggest, therefore, that the binding force of the decisions of the courts of the various States with respect to unfair competition and the obligation on the Federal Courts to apply them, supposed to result from *Erie Railway v. Tompkins*, are now removed. I suggest further that State decisions have been supplanted by the Conventions and the Federal statute, and for the first time citizens of the United States are assured in Federal Courts of effective protection against unfair competition by national law.” (p. xix.) (Italics added.)

ARTHUR A. MARCH.

A number of articles on the new Lanham Act have appeared in recent months in *The Trade-Mark Reporter* and the *Bulletin of the United States Trade-Mark Association*. Writing in this publication, Mr. Arthur A. March, in his article entitled “Unfair Competition Defined” (Vol. XXXVII, No. 9, November, 1947), reaches the same conclusions as the authors above:

“When cognizance is taken of the fact that treaties together with the constitution and *laws* made in pursuance thereof constitute the supreme law of the land, it will be realized that perhaps rectification of effects of the *Eric* case as it pertains to unfair competition is in the offing.

“While it may be maintained that we have had in prior years a declaration of unfair competition in a Federal statute, the Federal Trade Commission Act, without any appreciable aid resulting therefrom it must be remembered that this law specifically applies to acts which may be prosecuted by a governmental agency and not to *inter partes* actions. The courts rightfully restricted themselves to this interpretation. The Lanham Act, however, does deal with *inter partes* relationships and we now apparently have a law defining Unfair Competition, in one aspect made in pursuance of a treaty, which constitutes the supreme law of the land. Specifically it applies to citizens of the United States as well as to foreign nationals.

“Hence, whenever unfair competition rears its head in the future, remedies should be available under the Lanham Act by filing suit in the particular District Court having jurisdiction. Of further interest in this connection is the fact that ‘diversity of citizenship’ and ‘amount in controversy’ as prerequisites to obtaining Federal Court jurisdiction are eliminated, for the Lanham Act itself provides that Federal Courts shall have original jurisdiction of all actions arising under the Act without regard to the amount in controversy or to the diversity or lack of diversity of the citizenship of the parties.” (pp. 736-37.) (Italics added.)

STEPHEN P. LADAS.

Section 44 of the Lanham Act was drafted and submitted by Mr. Stephen P. Ladas, Chairman of the International Committee of the United States Trade-Mark Association, and Mr. Edward S. Rogers, quoted above. Mr. Ladas, commenting on the original of this section in *The Trade-Mark Reporter* for March, 1948, Vol. XXXVIII, No. 3, says:

“One of the most interesting features of the Lanham Act as compared with our previous statutes is that it contains a special title, Title 9, ‘International Conventions.’

“This was an idea of Edward S. Rogers. In late November, 1937, he telephoned me and suggested that it would be a good idea to include in the new Trade-Mark Act a separate chapter on International Conventions. I said that would be an excellent plan and Mr. Rogers quickly suggested that I prepare this chapter. I never refuse Mr. Rogers anything. Besides, this was something that really interested me. So on December 3, 1937, I submitted draft of a chapter that contained Sections A to I. This is what is now Section 44 and my Sections A to I are the subsections of Section 44. Aside from certain changes in literary style to make it conform to the rest of the Act, the present Section 44 is practically the text Mr. Rogers and I prepared in 1937, with the exception of the feature that I shall mention later.

“It was indeed the intention of those who labored on this Act, as well as Congress, to do as complete a job as possible in carrying out the stipulations of the International Convention to which the United States has become a party. The title of the Act specifically provides ‘to carry out the provisions of certain International Conventions’ as one of its pur-

poses. And the last words of Section 45 state that the intention of the Act is 'to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade-names and unfair competition entered into between the United States and foreign nations.' " (pp. 278-79.)

The author continues as follows :

"Mr. Rogers in his last lecture indicated the significance of sub-sections (h) and (i) of Section 44 from the point of view of unfair competition law enforceable by the Federal Courts. I fully share his views that the Lanham Act, by virtue of these provisions, has changed the situation created by the *Erie Railroad v. Tompkins* case. I may be permitted to quote what I wrote to Mr. Rogers on December 3, 1937, in submitting the draft which became Section 44.

"*'These provisions have the effect of placing trade-names and unfair competition under Federal control when in commerce within the control of Congress. I submit that this could be done directly in so far as interstate commerce is concerned, and it may be done thus indirectly in a provision extending rights to foreigners and then securing the same benefits to American citizens and residents as to foreigners.'*" (p. 288.) (Italics added.)

RUDOLPH CALLMANN.

Rudolph Callmann, author of *The Law of Unfair Competition and Trade-Marks* is quoted in *The Trade-Mark Reporter* as follows :

"Section 43 of the Lanham Act can (and should) be regarded as a direct source of federal law against false advertising. Even if it is not, however, Section 44 may offer an indirect source of such a law by its reference to international treaties and their broad

concepts of unfair competition. Section 44(h) declares that any foreign national, resident or business 'shall be entitled to effective protection against unfair competition' and that all the remedies provided in the Act for infringement of marks 'shall be available so far as they may be appropriate in repressing acts of unfair competition.' Section 44(i) declares that United States citizens or residents are entitled to the same benefits as those granted to foreign persons under Section 44. When the language of these provisions is read in the light of their legislative history, they appear to import the development of a new corpus of federal law against unfair competition, as that term is construed in its broader sense, with the result that an action for unfair competition in commerce, whether involving foreigners or American nationals, would be one 'arising under this Act.' Under this view, jurisdiction over such causes will now be vested in the federal courts, irrespective of diversity of citizenship or the amount in controversy, and the courts should apply federal law and not the common law of the states, thereby depriving the rule of *Erie R. R. v. Tompkins* of an important segment of its newly acquired domain.

"The Lanham Act is intended 'to protect persons engaged in . . . commerce against unfair competition' Unfair competition, as used in Section 44 refers to the broad common sense concept of unfair competition and not the term of art classically synonymous with 'passing off' in cases involving non-technical trade-marks. Section 44(g) adverts specifically to the latter concept in affording protection to trade-names or commercial names 'without the obligation of filing or registration whether or not they form parts of marks.' It is a wholly justifiable inference that the term 'unfair competition,' used in

a section designed 'to provide rights and remedies stipulated by treaties and conventions respecting . . . unfair competition' was intended by the draftsmen in its broader sense, as it is used in such treaties and conventions. The Congressional Hearings furnish sufficient proof that the legislators were fully cognizant of the implication of that usage and its interpretation.

"It could be argued with some merit that the law of unfair competition is entitled to the dignity of a true resident in the house of jurisprudence and that it should not be forced to make its appearance therein through the 'servants' entry'—through a statute primarily designed to create a new law of trade-mark registration and to give effect to international conventions. But it is in line with our tradition that the law of trade-marks, even though it is commonly said to be a branch of the law of unfair competition, should be not the off-spring but the father of our law of unfair competition. The law of trade-marks has, of course, seniority, and the law of unfair competition was initially distilled out of the artificial common-law distinction between the technical and the non-technical trade-mark. Only reluctantly did the courts emancipate unfair competition from its common law servitude and give impetus to the development of its common sense concept. The Lanham Act is in harmony with this tradition."

The Trade-Mark Bulletin, 38 T. M. R. 1057, 1058.

It thus appears that it was the intention of the experts who drafted the Lanham Act to create a federal cause of action for unfair competition, and this conclusion is further borne out by the discussions at the Congressional hearings, at which the purpose of the language of Section 44 is explained.

C. Rules of Statutory Construction and Interpretation Require the Decision That United States Courts Are Required to Take Jurisdiction of Simple Actions in Unfair Competition.

“The plain meaning of the words of the act covers this use. No single argument has more weight in statutory interpretation than this: Nothing in the legislative history is brought to our attention which indicates any other purpose in Congress than that expressed by the words of the act. The final form of the enactment did not vary in this particular portion from the bill originally introduced.”

Browder v. United States, 312 U. S. 335, 85 L. Ed. 862, 865, 61 S. Ct. 599.

“It is a general rule that the courts, in the interpretation of a statute, may not take, strike, or read anything out of a statute, or delete, subtract, or omit anything therefrom. To the contrary, it is a cardinal rule of statutory construction that significance and effect should, if possible, be accorded to every word, phrase, sentence, and part of an act.”

50 *Am. Jur., Statutes*, §231.

“The construction of the statute should be made with reference to the purpose of the statute, or in the light thereof, and in harmony and conformity therewith, in order to aid, advance, promote, subserve, support, and effectuate such aim, design, motive, end, aspirations, or object.”

50 *Am. Jur., Statutes*, §303.

“Frequently, the purpose of a statute is expressly stated therein. Where such declared purpose is not incompatible with the meaning and effect of the statute, it is to be taken as true . . . Hence, in determining the purpose of a statute, or the mischief to be remedied, recourse may be had to recitals thereof in the title or preamble.”

50 *Am. Jur., Statutes*, §307.

D. Congress Intended to Require United States District Courts to Hear and Decide Actions for Unfair Competition Similar to the Instant Cause.

A pertinent discussion regarding the section of the act as phrased in the earlier draft referred to took place during the House hearings on H. R. 4744 which was an earlier draft of the Trade-Mark Act, and the discussion has been quoted verbatim in Appendix A, attached hereto.

It is evident from said discussion at the hearing on H. R. 4744 and particularly from the remarks of Mr. Rogers and Mr. Williams regarding putting the prohibition against unfair competition into statutory form that the drafters and the proponents of the Trade-Mark Act of 1946 definitely intended to provide American business men with recourse to the Federal Court in unfair competition actions arising out of interstate commerce.

The intent of the drafters of the Act is also clearly conveyed in Mr. Lanham's report to the House on the first draft of this legislation which was embodied in H. R. 6618. He said,

“There is no essential difference between trade-mark infringement and what is loosely called unfair competition. Unfair competition is the genus of which trade-mark infringement is one of the species

. . . All trade-mark cases are cases of unfair competition and involve the same legal wrong. The essence of the wrong consists in the sale of goods of one manufacturer or vendor for those of another. The essential element is the same in trade-mark cases as in cases of unfair competition unaccompanied with trade-mark infringement."

It is evident from the above remarks of the congressional sponsor of the new Trade-Mark Act that from the very beginning and in the earliest draft of this legislation due consideration was being given to the general idea that the businessman should be given some protection against the genus wrong of unfair competition of which the trade-mark infringement was only a species. As Mr. Lanham said in another portion of the same report:

"Moreover, ideas concerning trade-mark protection have changed in the last 30 years and the Statutes have not kept pace with the commercial development. In addition, the United States has become a party to a number of international conventions dealing with trade-marks, commercial names and the *repression of unfair competition*. These conventions have been ratified, but it is a question whether they are self-executing, and whether they do not need to be implemented by appropriate legislation.

"Industrialists in this country have been seriously handicapped in securing protection in foreign countries due to our failure to carry out, by statutes, our international obligations. There has been no serious attempt fully to secure to nationals of countries signatory to the convention their trade-mark rights in this country and to protect them against wrongs for which protection has been guaranteed by the Convention."

It is apparent that the provisions embodied in Section 44(h) were intended to convey and to preserve to foreigners those rights which the United States by adhering to the International Conventions promised to give to foreigners in the protection of their trade-marks and in securing them against unfair competition. It was the natural outcome that legislation which granted to foreigners the right to enter the Federal Courts to protect themselves against unfair competition should have secured to citizens or residents of the United States in Section 44(i) a similar right. It was the manifest intent of Congress to grant to both foreigners and to United States citizens or residents protection against unfair competition by granting to them the right of recourse to the Federal Courts in unfair competition actions regardless of diversity of citizenship or the amount involved in the controversy.

Mr. Lanham in the same report clearly stated the objectives of the Act in the following outline:

“This Bill attempts to accomplish these various things:

“(1) To put all existing trade-mark statutes in a single piece of legislation.

“(2) To carry out by statute our international commitments to the end that American traders in foreign countries may secure the protection to their marks to which they are entitled.

“(3) To modernize the trade-mark statutes so that they will conform to legitimate present-day business practice.

“(4) To remedy conceptions of the present Acts which have in several instances obscured and perverted their original purpose. These conceptions have

become so ingrained that the only way to change them is by legislation.

“(5) Generally, to simplify trade-mark practice, to secure trade-mark owners in the good will which they have built up and to protect the public from imposition by the use of counterfeit and imitated marks and false trade descriptions.”

The second purpose of the Act clearly states that it is the manifest intent of Congress “to carry out by statute our international commitments.” Since one of our international commitments is the preservation of foreigners from unfair competition and since the drafters of the Trade-Mark Act have by statute provided foreigners with recourse to the Federal Courts, it is obvious that in Section 44(i) the legislature intended to grant American citizens or residents the same rights.

Since, in the past, unfair competition actions which did not involve diversity of citizenship and a minimum amount of \$3,000.00 could not be tried in the Federal Courts and since there was no Federal statute covering unfair competition which did not affect the public interest, it was essential for Congress to implement its adherence to the International Conventions by providing a statutory means to protect foreigners from unfair competition. The theory lying behind such statutory protection is clearly delineated by Mr. Lanham in his report. Mr. Lanham writes:

“The theory once prevailed that the protection of trade-marks was entirely a state matter and that the right to a mark was a common law right. This theory was the basis of previous national trade-mark statutes. Many years ago the Supreme Court held and has recently repeated that there is no Federal

common law. It is obvious that the states can change the common law with respect to trade-marks and many of them have, with the possible result that there may be as many different varieties of common law as there are states. A man's rights in his trade-mark may differ widely in one state from the rights which he enjoys in another.

“However, trade is no longer local, but is national. Marks used in interstate commerce are properly the subjects of Federal regulation. It would seem as if national legislation along national lines securing to the owners of trade-marks in interstate commerce definite rights should be enacted and should be enacted now.”

The above remarks imply that the Congressional intent was to take the protection of trade-mark rights out of the common law sphere and to place it under the protection of a Federal statute. Since the statutory involvement of our obligation with foreign signatories to the International Convention required the statutory enactment of a means of implementing the unfair competition clauses involved in those conventions, the drafters of the Trade-Mark Act embodied therein a provision which gave recourse to the Federal Courts in unfair competition causes. In addition, it is evident that the Congress intended to grant a similar right to United States citizens or residents in view of the provisions of Section 44(i) and to take the action for unfair competition out of the realm of the common law and from under the aegis of state courts.

During the hearings of the Subcommittee on Trade-Marks of the Committee on Patents of the United States on H. R. 82 which resulted in the present Trade-Mark

Act, the following discussion took place which is reprinted on page 133 of the published hearings:

“Miss Robert: The only comment I have to make is that this is a bill to regulate domestic commerce, to protect domestic trade-mark owners, to register trade-marks in the United States Patent Office . . . One of the most important intents of this bill is to bring all trade-mark law into conformity with the International Conventions to which this nation is an adherent and to give reciprocal advantages which the convention provides.”

This is a statement made by one of the best informed proponents of the Trade-Mark Act.

Miss Robert, during the various hearings which extended over a period of more than five years, was continually relied upon by the members of the committees of both the House and Senate handling the trade-mark legislation to give expert opinion regarding the provisions of the act and to prepare various amendments thereto. Of particular interest is her statement that the bill is to regulate domestic commerce and to bring our trade-mark law into conformity with the International Conventions to which this nation is an adherent.

Conclusion.

It is respectfully submitted, therefore, that Section 44 of the Act does not by mere inadvertence provide a Federal remedy for unfair competition. Clearly Congress intended to protect interstate commerce under the Lanham Act from unfair acts of competition and intended to provide the remedies for such protection on an equal footing with Federal remedies relating to trade-mark infringement.

It thus appears clear that by virtue of the Lanham Act unfair competition involving goods or services in interstate commerce is a Federal cause of action with original jurisdiction in the Federal courts, and from

- (1) the mere reading of the statutory provisions, Sections 44(b), 44(h), and 44(i) of the act,
- (2) the expressed intent of Congress as indicated in Section 45 of the act,
- (3) the comments of the framers of the act and the most prominent authorities in the field, namely, Daphne Robert, Edward S. Rogers, Stephen P. Ladas, Arthur A. March and Rudolph Callmann, and,
- (4) Accepted rules of statutory construction.

It is therefore respectfully submitted that the United States District Court has jurisdiction over the subject matter of this action, and that the judgment of the District Court should be reversed.

Signed at Los Angeles, California, this 26th day of August, 1949.

FORREST F. MURRAY,
HARRIS, KIECH, FOSTER & HARRIS,
FORD HARRIS, JR.,
JACK BARRY, JR.,

Attorneys for Appellants.

APPENDIX "A."

From Discussion at Hearing on H. R. 4744.

"Mr. Rogers: If I might explain, Mr. Chairman, that section was drafted by Mr. Dienner, who was the American representative at the last convention revision.

"Mr. Lanham. I recall he was before us last year.

"Mr. Rogers. He was before you last year, and he apologized for not being present this year, but he is engaged in the trial of a case. Also, Dr. Ladas, a research fellow at Harvard and now practicing in New York, who has written an internationally authoritative book on this subject; and they assure me that everything that we are obligated to do in our International Conventions is included in this title. I think, however, that I will call the attention of the committee to one thing. That is paragraph (h) on page 29, beginning at line 7:

" 'Citizens or residents of the United States shall have the same benefits as are granted by this section to persons described in paragraph (a) hereof.' "

"We have the curious anomaly of this Government giving by treaty and by law with respect to trade-marks and unfair competition to nationals of foreign governments greater rights than it gives to its own citizens. I am simply calling attention to that fact. This is an attempt to put the citizen on an equality with the foreigner instead of just the reverse, which is usually the case.

"Mr. Lanham. I dare say we will find no objection to that.

"Mr. Thomson. Mr. Chairman, I have merely called the attention of Mr. Rogers to subsection (g), which says that—

“All acts of unfair competition in commerce are declared to be unlawful and the provisions of sections 32 to 35, inclusive, shall be applicable thereto.

That covers a very wide field, and its construction has given jurisdiction to the Federal courts in any case involving unfair competition, regardless of diversity of citizenship. I think some consideration should be given to the effect of that section.

“Mr. Rogers. By all the conventions we undertake to grant to foreigners effective protection against unfair competition. The foreigner says, ‘What have you given us?’ And the answer usually is, ‘There is the Federal Trade Commission Act.’ Well, what is that? That is only unfair competition that directly affects the public. Then you talk to a foreigner about the common law, and he says, ‘What is that? We haven’t any such thing in our country.’ And then we try to explain that there are 48 varieties of common law in the United States, and he says, ‘Which one is the one that I am entitled to be protected under? There is no Federal statute that helps me.’ Now I am not prepared to say what would be the effect of this paragraph (g), but because we haven’t put it in some kind of Federal statute some time, our people are being refused protection abroad because they say there is no reciprocity.

“Mr. Byerly. Mr. Chairman, if I may make a suggestion, it seems to me this is extremely broad and difficult to understand, and the place that this ought to go in, it seems to me, is in section 32.

“Mr. Lanham. You mean paragraph (g)?

“Mr. Byerly. Paragraph (g); yes. It says that this certain section shall apply to unfair competition. Now you may remember section 32 is in the words of the old

act which apparently relates to trade-mark infringement but which when you consider this new act with our new section 2, allowing secondary-meaning words, section 32 covers unfair competition, and I suggested recording it in a way that would make it plainer. They did that, and I am not sure, although I yielded to Mr. Rogers' suggestion that we stick to the words of the old act here for convenience, that if we changed those words so as to make it evident that it did cover unfair competition, we could not then leave out this rather vague section which has been put in later, which apparently does not require you to have registration, and therefore it is difficult to see how you have any Federal law at all, to simply make 32 expressly cover unfair competition. I would be glad to read you the draft that I made with that intention if it would interest you. Could you give me that, Mr. Reporter? It is the part that I scratched out. My suggestion, Mr. Chairman, is that we leave out altogether the provisions of the whole subsection (g) on page 29, and rewrite the section 32 as follows:

"Any person who shall falsely indicate to the public that any goods or articles shipped or sold in commerce are goods or articles manufactured or sold by a person who has registered a trade-mark under this Act by affixing to or using in connection with the sale or advertisement of such goods any copy, counterfeit or colorable imitation of any trade-mark registered under this Act shall be liable to a civil action by the registrant for any or all of the remedies hereinafter provided.

"Now I think it a statement which covers both trade-mark infringement and unfair competition, to which we could point directly in case of the foreigner raising the question of how we protected him against unfair compe-

tition, and it would be the simplest way to deal with it, because it would in this way give our citizens those rights as well as foreigners. That is, the essence of unfair competition as used in connection with the trade-mark law, is to give a false impression that goods which are not made by this registrant, let us say, are made by him. That is the gravamen of the offense, and it is to that that I suggest the words of section 32 be directed, so that we can leave out this other section.

“Mr. Lanham. Mr. Rogers?

“Mr. Rogers. I quite agree that Mr. Byerly has drafted an admirable definition of unfair competition, but I should not like to see it substituted entirely for the language that is in this draft and that has been taken over from existing law, because it is directed to two things. First, the traffic in copies, counterfeits, or colorable imitations, as such; and second, the application of a copy, counterfeit, or colorable imitation to competing goods.

“Now perhaps some place could be found for an added section to give Mr. Byerly’s very excellent definition of unfair competition. The difficulty is however that unfair competition is what Lewis Carroll used to like to call a ‘portmanteau’ word—it means a lot of things, and it means different things to different people, and the minute you attempt to define it you limit it, just as you limit ‘fraud’ when you attempt to define it. I wonder if Mr. Byerly would have any objection to putting in this section which we are now considering, under (g), and cross out any reference to sections 32 and 35?

“Mr. Byerly. It seems to me a long way from home there, because the rest of section 32 describes the effect of the registration in such suits, and I can not help feel-

ing it is illogical; I think it would be simpler to add this to some of the things that section 32 already says—and start off with ‘anybody who puts a counterfeit in trade,’ and take that all in, and then follow that with ‘or any one who commits unfair competition’ in the words that I previously stated it. Then the whole thing could go into 32, which would be the logical place to define where you could sue a man.

“Mr. Rogers. That is all right with one possible exception. I think the definition is fine and would be useful as a congressional declaration of that sort of customs rascality this act is intended to stop, and that is unfair competition under all the definitions.

“Mr. Luce. I shall have to show my ignorance by asking if there is in the general statutes now any broad sweeping declaration of unfair competition—any prohibition of unfair competition.

“Mr. Rogers. Only in the Federal Trade Commission Act, where the general phrase is used, ‘unfair methods of competition in commerce,’ shall be stopped by the Federal Trade Commission.

“Mr. Williams. Mr. Harry D. Nims, who is something of an authority on trade-mark law, has said to me that he has always resisted every effort to define ‘unfair competition’ in statutes.

“Mr. Luce. This is all comprehensive, and I wondered how far it might be carried.

“Mr. Rogers. ‘Unfair competition’ is a term that is pretty well understood. It is a compendious term. I recall very well, if I may digress a little, a student of mine, after listening stoically to a course of lectures on unfair competition, came up to ask me a question afterwards.

I was wondering what he was getting out of this course, and I asked him what he understood by 'unfair competition.' He said, 'Well, it seems to me it is the efforts of the court to keep people from playing dirty tricks on each other.' And really you might look through the books a long while and not find a better definition than that. It is conduct which artificially interferes with the normal course of trade by misrepresentation, by disparagement, by trade bribery, and all that sort of stuff.

"Mr. Luce. And that is now definitely prohibited?

"Mr. Rogers. Not by statute.

"Mr. Luce. Then you are putting in here a statute?

"Mr. Rogers. Yes; but we have got it in the convention, and our friends are criticizing us because we say it is in the convention, and we have not implemented that convention.

"Mr. Luce. You are extending and putting in here a phrase which was not intended to apply to the trademark?

"Mr. Rogers. No; I perhaps did not make myself clear. The convention provides that we will give to foreigners, signatories of the convention, effective protection.

"Mr. Luce. You do not get what I am after. This is not tied up with conventions?

"Mr. Rogers. Oh yes; it is under the heading 'Convention.' It deals with nothing else.

"Mr. Luce. It does not seem to me to be adequate law-making to advert to a title of a series of paragraphs to justify a general statement of that sort.

"Mr. Rogers. I think if you will start at page 26 of section 45 you will see what we are driving at.

“Mr. Luce. I see, but I want some word there to tie it up with that heading.

“Mr. Rogers. I should think that this would do it:

“Persons national of, or domiciled in, or having a bona fide and effective business or commercial establishment in any country, which is a party to the International Convention for the Protection of Industrial Property—

and so forth. I should think that paragraph (a) of section 45 indicates clearly enough that it is intended to implement the convention.

“Mr. Luce. I have no doubt of that.

“Mr. Rogers. Yes, sir.

“Mr. Luce. But I am in business, and I come across this statement without qualification and without its being tied up with anything else, to the effect that all unfair competition is unlawful. Well, I think there is a lot of unfair competition. If you put in there ‘pertaining to trade-marks,’ or something else, or tie it up in that way now, you would lift it out of its context and use it.

“Mr. Rogers. That would be true if ‘unfair competition’ were not pretty well known as a term of law to describe a type or class of wrong.

“Mr. Luce. Yes.

“Mr. Rogers. The books are full of those cases.

“Mr. Luce. Yes; what is the objection to limiting it to trade-marks?

“Mr. Rogers: Well, because frequently ‘unfair competition’ has nothing to do with trade-marks.

“Mr. Lanham. Mr. Luce, I think, means with reference to this particular act dealing with trade-marks. ;

“Mr. Rogers. Yes; but the trouble is that conventions deal with trade-marks and unfair competition.

“Mr. Lanham. Oh, I see.

“Mr. Byerly. I agree with Mr. Luce that this section as it is is dangerously broad. Particularly, you say it is meant to carry out the convention, but in the very next paragraph you say that natives are to gain all the benefits that foreigners get, so it is broadly alleged that every act of unfair competition is illegal and that there shall be a right of action in the Federal courts for it, without in any way defining it or tying it up to registration, and it seems to me that whatever the convention may be, what we give them ought to be something that is reasonably clearly defined, and that is a case where we should not mix up our domestic law in order to carry out a somewhat vague treaty.

“I think if I could make my previous suggestion a little more definite, I should say that in section 32, we could preserve the first three lines, down to the fourth line, that is, as far as the word ‘act,’ on line 18, page 17, which deals directly with ‘reproducing, making counterfeits of trade-marks,’ and then add the language which I just read to you, in substance, ‘any person who falsely indicates to the public that any goods or articles are the goods of the registrant,’ which covers unfair competition at least in the ordinary sense of the word, which is passing off your goods for the goods of others, but ties it up to a registration granted under this act, so that there is some basis for the Federal jurisdiction, and if we put that in 32 instead of the following language that is there now, I think that we would have something which we could very plausibly tell our foreign friends that, ‘This is what we consider unfair competition, and if you will register your trademark here,

you will get this protection.' At the same time it fits right in with the purpose of the whole act in allowing any distinctive mark to be registered, and would make a consistent law without a somewhat dangerous, broad, extraneous passage such as you have in (g) on this other page.

"I should like to suggest that (g) be altogether omitted.

"Mr. Williams. I respectfully submit that as matters now stand we cannot go into the Federal courts in the case of unfair competition unless we have diversity of citizenship, also the amount in controversy. This would give us the right to go in there without regard to those limitations, which is decidedly advantageous. The courts have sufficiently defined 'unfair competition,' and it is well enough to define it in this statute. I think that as it stands it is all right.

"Mr. Lanham. You think that subsection (g) should remain in this title?

"Mr. Williams. Yes; I think so." (Italics added.)

No. 12258.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

B. H. STAUFFER and STAUFFER SYSTEM, INC.,

Appellants,

vs.

KATHLEEN EXLEY,

Appellee.

BRIEF OF APPELLEE.

FRANK P. DOHERTY,

WILLIAM R. GALLAGHER,

FRANK W. DOHERTY,

717 Title Insurance Building, Los Angeles 13,

Attorneys for Appellee.

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PAUL P. O'BRIEN,

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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BRIEF OF APPELLEE.

I.

Statement of the Pleadings and Facts Disclosing Lack of Jurisdiction in the District Court.

The only pleading necessary to consider is the complaint. It is conceded by appellants that no diversity of citizenship exists and that the complaint alleges merely a simple action in unfair competition, not related to a substantial or any claim under the copyright, patent or trade-mark laws (Op. Br. p. 2).

The controlling jurisdictional statute herein is Subsection (b) of Section 1338 of the New Judicial Code. Said Section 1338 reads as follows:

“(a) The district courts shall have original jurisdiction of any civil action arising under any Act of

Congress relating to patents, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition *when joined with a substantial and related claim under the copyright, patent or trade-mark laws.*” (See footnote.)

The foregoing section of the New Judicial Code is part of the Revision of the Judicial Code, effective September 1, 1948. This Revision covers the entire field of jurisdiction of the United States Courts, including the District Court, and manifestly was designed to embrace the entire subject of legislation with respect to jurisdiction in all of the federal courts.

The Lanham Act, relied upon by appellants, became effective July 5, 1947, approximately fourteen months prior to the effective date of the New Judicial Code. Anything contained in the said Lanham Act which might possibly be construed to vest the District Courts with jurisdiction in simple unfair competition actions must be deemed to be entirely superseded by the New Judicial Code.

Note: All emphasis added.

II.

Summary of Argument.

A. IN THE ABSENCE OF DIVERSITY OF CITIZENSHIP, THE DISTRICT COURT HAS NO JURISDICTION OF A SIMPLE ACTION IN UNFAIR COMPETITION WHERE SUCH ACTION IS NOT JOINED WITH A SUBSTANTIAL AND RELATED CLAIM, UNDER THE COPYRIGHT, PATENT OR TRADE-MARK LAWS.

B. THE NEW JUDICIAL CODE IS A COMPLETE REVISION OF THE EXISTING LAWS GOVERNING JURISDICTION OF THE DISTRICT COURTS AND EMBRACES THE ENTIRE SUBJECT OF JURISDICTION SUPERSEDING ALL PRIOR LAWS.

III.

ARGUMENT.

A. In the Absence of Diversity of Citizenship, the District Court Has No Jurisdiction of a Simple Action in Unfair Competition Where Such Action Is Not Joined With a Substantial and Related Claim, Under the Copyright, Patent or Trade-mark Laws.

Subsection (b) of Section 1338 of the New Judicial Code was added to conform to the ruling of the Supreme Court in *Hurn v. Oursler*, 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed. 1148. It was there held that the District Court had jurisdiction of an action for unfair competition where such action was joined with a substantial federal claim sufficient to found federal jurisdiction. The Revision of the Judicial Code has now adopted this holding by enacting it into statutory law. In this respect Mr. William W. Barron, chief reviser, comments as follows in 8 F. R. D. 439 at p. 442:

“Subsection (b) of section 1338 is new. It is added to give to district courts original jurisdiction

of any civil action asserting a claim for unfair competition when joined with a substantial and related claim under the patent, copyright or trade-mark laws. The Supreme Court in *Hurn v. Oursler* held that such a claim for unfair competition of which a federal court has no original jurisdiction is nevertheless within its ancillary jurisdiction when it arises from the same acts which give rise to the claim of copyright infringement.

The statutory confirmation of the jurisdiction of federal courts in cases like these should not be regarded either as an extension or limitation of ancillary jurisdiction in other cases or under other circumstances."

The report of the committee on the judiciary of the House of Representatives with respect to the revision of Title 28 of the United States Code, states in part as follows with respect to the revision of Section 1338:

"Subsection (b) is added and is intended to avoid 'piecemeal' litigation to enforce common-law and statutory copyright, patent, and trade-mark rights by specifically permitting such enforcement in a single civil action in the District Court. While this is the rule under Federal decisions, this section would enact it as statutory authority. The problem is discussed at length in *Hurn v. Oursler* (1933, 53 S. Ct. 586, 289 U. S. 238, 77 L. Ed. 1148) and in *Musher Foundation v. Alba Trading Co.* (C. C. A., 1942, 127 F. 2d 9) (majority and dissenting opinions)."

Revision of Title 28, Report of Committee on Judiciary House Report No. 308, page A119.

Subdivision (b) of Section 1338 means exactly what it says. *It is a new section*, clearly and unequivocally

specifying that a simple action in unfair competition such as is here involved may be brought in the Federal Court only when joined with a *substantial* and *related* claim under the copyright, patent or trade-mark laws. There being no claim under the copyright, patent or trade-mark laws involved herein, the District Court was therefore clearly right in dismissing the within action for lack of jurisdiction.

B. The New Judicial Code Is a Complete Revision of the Existing Laws Governing Jurisdiction of the District Courts and Embraces the Entire Subject of Jurisdiction Superseding All Prior Laws.

1. A REVISION OF LAWS EMBRACING AN ENTIRE SUBJECT OF LEGISLATION REPEALS ALL FORMER LAWS ON THE SAME SUBJECT EVEN IN THE ABSENCE OF A REPEALING CLAUSE TO THAT EFFECT.

The foregoing rule is stated in 50 Am. Jur., page 559, Section 556, as follows:

“556.—Repeal by Implication.—As a general rule, the enactment of revisions and codes manifestly designed to embrace an entire subject of legislation, operates to repeal former acts dealing with the same subject, although there is no repealing clause to that effect. Under this rule, all parts and provisions of the former act or acts, that are omitted from the revised act, are repealed, even though the omission may have been the result of inadvertence. The application of the rule is not dependent on the inconsistency or repugnancy of the new legislation and the old; for the old legislation will be impliedly repealed by the new even though there is no repugnancy between them.”

The same rule was announced by the Supreme Court of the United States in *Cook County National Bank v. United States*, 107 U. S. 445, 2 S. Ct. 561, 566, 27 L. Ed. 537, wherein it was held that a general statute giving the United States preference as a creditor did not apply to the National Banking Act. The rule is stated at page 539 of 27 L. Ed. as follows:

“The doctrine as to repugnant provisions of different laws is well settled, and has often been stated in decisions of this court. A law embracing an entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of a general law *as effectually as though, as to such subject, the general law were in terms repealed.*”

It is clear that the intent of Congress in adopting the New Judicial Code, was to codify and revise the entire subject of jurisdiction of the United States courts and particularly the jurisdiction of said courts with respect to copyright, trade-mark, patent and unfair competition cases. The former sections of the United States Code dealing with jurisdiction in patent, trade-mark and copyright cases (Title 28, U. S. C., 1940 Ed., Sections 41(7) and 371(5)) were consolidated. These former sections merely provided that the District Courts should have jurisdiction of all cases arising out of the patent, copyright and trade-mark laws. In the revision, an additional substantial clause was added, namely, Subsection (b) of Section 1338 to the effect that the District Courts would have jurisdiction of unfair competition actions when joined with a substantial and related claim under the copyright, patent or trade-mark laws. It is thus manifest from the language of the revision itself that it was the intent of Congress to embrace the entire field of juris-

diction in the new revision, and to supersede all prior laws on the same subject. This intent is further confirmed by the comments of Chief Reviser, Mr. William W. Barron and the Report of the House Judiciary Committee, hereinbefore set forth.

From the foregoing, it is apparent that the Lanham Act is entirely superseded in so far as it deals with the subject of jurisdiction of the District Courts in simple actions for unfair competition where no diversity of citizenship exists.

Conclusion.

It follows from the foregoing that the District Court was without jurisdiction of the within action, and the Judgment of Dismissal should therefore be affirmed.

Respectfully submitted,

FRANK P. DOHERTY,

WILLIAM R. GALLAGHER,

FRANK W. DOHERTY,

By WILLIAM R. GALLAGHER,

Attorneys for Appellee.

No. 12258.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

B. H. STAUFFER and STAUFFER SYSTEM, INC.,

Appellants,

vs.

KATHLEEN EXLEY,

Appellee.

REPLY BRIEF FOR PLAINTIFFS- APPELLANTS.

FORREST F. MURRAY,

1010 Ninth and Broadway Building, Los Angeles 14,

HARRIS, KIECH, FOSTER & HARRIS,

FORD HARRIS, JR.,

JACK BARRY, JR.,

321 Subway Terminal Building, Los Angeles 13,

Attorneys for Appellants.

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No. 12258.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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vs.

KATHLEEN EXLEY,
Appellee.

REPLY BRIEF FOR PLAINTIFFS- APPELLANTS.

This is in reply to "Brief of Appellee." Appellee has failed squarely to answer or to face the arguments previously made herein by appellants. However, appellants meet in the following argument the collateral point interjected by appellee.

Summary of Argument.

A. APPELLANTS HAVE PROVED THAT ORIGINAL JURISDICTION LIES IN THE UNITED STATES DISTRICT COURTS IN UNFAIR COMPETITION ACTIONS SUCH AS THE CASE HEREIN BY VIRTUE OF THE LANHAM ACT AND 28 U. S. C. 1337.

B. APPELLEE DOES NOT DENY THAT THE LANHAM ACT GAVE JURISDICTION TO THE UNITED STATES DISTRICT COURTS IN ACTIONS SUCH AS THE ONE HEREIN.

C. APPELLEE'S SOLE ARGUMENT THAT THE NEW JUDICIAL CODE REPEALS BY IMPLICATION THE JURISDICTIONAL PORTIONS OF THE LANHAM ACT IS ERRONEOUS.

D. THE NEW JUDICIAL CODE EXPRESSLY NEGATIVES REPEAL BY IMPLICATION.

E. CONCLUSION.

1

ARGUMENT.

- A. Appellants Have Proved That Original Jurisdiction Lies in the United States District Courts in Unfair Competition Actions Such as the Case Herein by Virtue of the Lanham Act and 28 U. S. C. 1337.

I.

In our opening brief we showed that jurisdiction of the District Court of the case herein is required by the Trade-Mark Act of July 5, 1946 (Public Law 489, 79th Congress, Chapter 540, 2nd Session, 15 U. S. C. 1051-1127). This is popularly known as the Lanham Act. We pointed out also that jurisdiction of the District Court is specifically set out in Section 39 of the Lanham Act (15 U. S. C. 1121).

Also we showed that jurisdiction is given to the District Courts by the provisions of 28 U. S. C. 1337 which reads:

“The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.”

In our opening brief we quoted the title of the Lanham Act:

“An act to provide for the registration and *protection* of *trade-marks* used in *commerce*, to carry out the provisions of certain international conventions, and for other purposes.” (Emphasis ours.)

The regulation of trade-marks used in commerce and the protection of commerce against unfair restraints is within the purview and scope of the Lanham Act.

B. Appellee Does Not Deny That the Lanham Act Gave Jurisdiction to the United States District Courts in Actions Such as the One Herein.

The reply brief of appellee carefully avoids contention with the argument of appellants. By failure to resist appellants' argument appellee has *admitted* that both the Trade-Mark Act of 1946 and 28 U. S. C. 1337 confer jurisdiction to the District Courts of the United States in simple actions for unfair competition.

In substitution for argument upon the merits, appellee refers to 15 U. S. C. 1338 which purports only to enact the decisional law of *Hurn v. Oursler*, a case decided in 1933. The Lanham Act became effective July 5, 1947.

Appellee also refers to repeal by implication, and having set up this straw man, rests.

C. Appellee's Sole Argument That the New Judicial Code Repeals by Implication the Jurisdictional Portions of the Lanham Act Is Erroneous.

Appellee's sole point, "THE NEW JUDICIAL CODE IS A COMPLETE REVISION OF THE EXISTING LAWS GOVERNING JURISDICTION OF THE DISTRICT COURTS AND EMBRACES THE ENTIRE SUBJECT OF JURISDICTION SUPERSEDING ALL PRIOR LAWS" is vitiated by the express provisions of the New Judicial Code. Appellee's argument is the flimsy theory of repeal by implication which as stated by appellee is that enactments and revisions of codes designed to embrace the entire subject of legislation operate to repeal former acts dealing with the same subjects.

Specific provisions of the New Judicial Code provide for specific repeal of statutes to be repealed and categorically prohibit the application of a theory of implied repeal.

In view of the foregoing, the argument of appellee as to implied repeal becomes illusory and groundless as the following authorities hold:

“ . . . When such intention of the legislature can be ascertained, it is the duty of the courts to give it force and effect, since the intent of the law is its vital force, and the province of the courts is to ascertain and effectuate the valid legislative intent. Indeed, one statute will not be held to repeal another by implication unless it appears, from the terms and provisions of the later act, that it was the intention of the legislature to enact a new law in place of the old”

50 Am. Jur., Statutes, §535.

“Repeals by implication are not favored”

50 Am. Jur., Statutes, §538.

“ . . . As a general rule, the legislature, when it intends to repeal a statute, may be expected to do so in express terms or by the use of words which are equivalent to an express repeal, and an intent to repeal by implication, to be effective, must appear clearly, manifestly, and with cogent force. The implication of a repeal, in order to be operative, must be necessary, or necessarily follow from the language used, because the last or dominant statute admits of no other reasonable construction. The courts will not hold to a repeal if they can find reasonable ground to hold the contrary, if two constructions are possible, that one will be adopted which operates to support the earlier act, rather than to repeal it by implication.”

50 Am. Jur., Statutes, §538.

“ . . . Except where an act covers the entire subject-matter of earlier legislation, is complete in itself, and is evidently intended to supersede the prior legislation on the subject, a later act does not by implication repeal an earlier act unless there is such a clear, manifest, controlling, necessary, positive, unavoidable, and irreconcilable inconsistency and repugnancy, that the two acts cannot, by a fair and reasonable construction, be reconciled, made to stand together, and be given effect or enforced concurrently”

50 Am. Jur., Statutes, §543.

“Sometimes, a repeal by implication is negatived by express provision of the statute The usual function of a saving clause is not to create something, but to preserve something from immediate interference”

50 Am. Jur., Statutes, §550.

“The general principle of interpretation, that the mention of one thing implies the exclusion of another (*expressio unius est exclusio alterius*), has been regarded as applicable where an act makes substantive provisions and then expressly repeals specified acts, so as to repel an inference that acts not specified are impliedly repealed”

50 Am. Jur., Statutes, §551.

“ . . . Of course, if the revision or codification specifically exempts from repeal certain designated laws, such laws are not repealed by the revision or codification.”

50 Am. Jur., Statutes, §557.

D. The New Judicial Code Expressly Negatives Repeal by Implication.

The only statutes repealed by amendments to the Judiciary Code have been specifically enumerated.

The paper-backed United States Code, Congressional Service, 80th Congress, 2nd Session 1948, entitled "New Title 28, United States Code, Judiciary and Judicial Procedure with Official Legislative History and Reviser's Notes" (referred to in appellee's brief) contains Section 39, at page 1648. This reads:

"The sections or parts thereof of the Revised Statutes of the District of Columbia, Revised Statutes of the United States or Statutes at Large enumerated in the following schedule are hereby repealed. Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal."

At page 1670 which contains a portion of the schedule of laws repealed, including statutes at large and United States Code, and specifically the laws enacted in the year 1946 which are repealed, it will be seen that no provision of the Lanham Act or Trade-Mark Act of July 5, 1946, has been repealed.

At page 1699 of the same paper-backed edition of the United States Code is contained this paragraph in the section entitled "Legislative History—House":

"Section 35 and 36 provide for the specific repeal of all laws incorporated in the revision and other superseded and obsolete revisions relating to the courts. The schedule was carefully checked and re-checked many times. *This method of specific repeal will relieve the courts of the burdensome task of ferreting out implied repeals.*" (Emphasis added.)

E. Conclusion.

Appellee does not deny that the Lanham Act gave jurisdiction to the United States District Courts in simple actions for unfair competition. Appellee's argument that this jurisdiction has been impliedly repealed is controverted by express terms of the New Judicial Code. Appellants should prevail in this appeal.

Signed at Los Angeles, California, this 4th day of October, 1949.

FORREST F. MURRAY,
HARRIS, KIECH, FOSTER & HARRIS,
FORD HARRIS, JR.,
JACK BARRY, JR.,
Attorneys for Appellants.

No. 12258

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

B. H. STAUFFER and STAUFFER SYSTEM, INC.,
Appellants,

vs.

KATHLEEN EXLEY,
Appellee.

PETITION FOR REHEARING.

FRANK P. DOHERTY and
FRANK W. DOHERTY,
717 Title Insurance Building, Los Angeles 13,
Attorneys for Appellee.

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PAUL P. O'BRIEN,

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No. 12258
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

B. H. STAUFFER and STAUFFER SYSTEM, INC.,
Appellants,

vs.

KATHLEEN EXLEY,
Appellee.

PETITION FOR REHEARING.

APPELLEE RESPECTFULLY PETITIONS FOR A REHEARING
HEREIN ON THE FOLLOWING GROUNDS:

I.

THE OPINION HEREIN IS ERRONEOUS AND CONTRARY TO
SETTLED RULES OF APPELLATE PROCEDURE IN REMANDING
THIS CAUSE ON A POINT NOT RAISED, PLEADED OR URGED
BY APPELLANT IN THE TRIAL COURT OR ON APPEAL.

II.

IT IS UNFAIR TO THE TRIAL COURT AND TO APPELLEE
TO REMAND THIS CAUSE ON AN IMAGINARY, NON-EXISTING
ISSUE WHOLLY OUTSIDE THE RECORD.

III.

AN APPELLATE COURT MAY REMAND FOR FAILURE TO
MAKE A FINDING ONLY WHERE AN ISSUE IS RAISED AS
TO WHICH SUCH A FINDING SHOULD BE MADE.

IV.

THE OPINION HEREIN IS CONTRARY TO RULE 52(a) UNDER WHICH THE FINDINGS OF THE DISTRICT COURT MUST BE ACCEPTED BY THE APPELLATE COURT UNLESS SUCH FINDINGS ARE SHOWN BY THE RECORD TO BE "CLEARLY ERRONEOUS."

V.

THE OPINION HEREIN PLACES A STRAINED AND UNREASONABLE CONSTRUCTION ON THE LANHAM ACT.

VI.

THE RECORD HEREIN AFFIRMATIVELY SHOWS THAT THE APPELLEE IS NOT ENGAGED IN "COMMERCE" AND SHE IS ENTITLED TO HAVE THIS CAUSE DETERMINED ON THE RECORD PRESENTED.

VII.

APPELLANTS DO NOT CLAIM THAT APPELLEE'S ACTIVITIES CONSTITUTE OR AFFECT "COMMERCE" AND IN JUSTICE AND FAIRNESS TO HER, AN ORDER SHOULD BE ENTERED HEREIN REQUIRING APPELLANTS TO BEAR THEIR OWN COSTS.

ARGUMENT.

The remand herein was ordered for failure of the Trial Court to make a finding as to whether appellee's activities affected or constituted interstate commerce. No such claim has been made herein by appellants at any time and no such issue was raised or presented in any manner either in the Trial Court or in this Honorable Court. This cause has thus been remanded on a point not raised, claimed, urged or even suggested by appellants.

This decision, if allowed to stand, will open the door to any appellant to urge upon this Honorable Court the remand of a cause on the mere assertion of the existence of some imaginary issue not theretofore raised or presented. This is contrary to settled principles of appellate procedure. The finality of judgments should be encouraged and controversies should be adjudicated *on the record as presented*.

Here, the appellant does not even assert or claim the existence of any issue as to appellee being engaged "in commerce." In this situation, the language of the Supreme Court of the United States in *American P. & Mfg. Co. v. U. S.*, 300 U. S. 457, 81 L. Ed. 751 at 755, is particularly appropriate: "Under these circumstances, we see no reason for remanding the case upon the mere chance that the government may be able to furnish evidence which it has failed to furnish during more than a decade of litigation * * *." The within controversy had its inception four and one-half years ago. [Tr. p. 7, line 7.]

This Honorable Court follows the universal rule that it is only proper to remand for failure to make a finding where there was an *issue raised* as to which a finding

should be made. (*Marlborough Corp. v. U. S.*, 9 Cir., 172 F. 2d 787 at 788.) A trial court is only required to make findings on material issues presented by the pleadings and supported by the evidence. (53 Am. Jur. p. 788, Sec. 1134, n. 5.)

It is fundamental that a record should clearly disclose the basis for an appeal. (*St. Louis & S. F. R. R. Co. v. Willingham*, 8 Cir., 177 F. 2d 167 at 171.) In determining whether findings are "clearly erroneous" within the meaning of Rule 52(a) an appellate court must look to the record as presented. As was said by this Honorable Court in *U. S. v. Jones*, 9 Cir., 176 F. 2d 278 at 285: *From our own analysis of the record we cannot say his (the trial court's) conclusion was 'clearly erroneous.'*"* Findings are presumptively correct, and this Honorable Court has held that findings sustained by the evidence must be accepted unless clearly erroneous. (*Ruud v. Amer. Packing Co.*, 9 Cir., 177 F. 2d 538 at 540; *Kaname Fujino v. Clark*, 9 Cir., 172 F. 2d 384 at 385.)

Here the findings are supported by the record as to all issues raised below, and this Honorable Court has gone outside the record to order a remand for failure to find on an issue (possibly non-existent) not raised in any manner at any time. Under the foregoing authorities the District Court's findings should be accepted by this Honorable Court as determinative of this cause. As Chief Judge Denman states in his dissent herein: "*It is a wrong to appellee to manufacture a contention raising an issue with which appellee was not faced below nor is faced here.*"

*All emphasis added.

The Lanham Act Is Inapplicable.

We respectfully disagree with the majority opinion in holding that the Lanham Act gives the District Court jurisdiction if appellee is engaged in commerce. The purpose of this Act was to implement certain international treaties. The majority opinion holds that because none of its provisions appeared in the schedule of repealed laws in connection with the revision of the Judicial Code, said Act confers jurisdiction over this cause, provided appellee's activities affect appellant's interstate commerce. This reasoning is wholly unsound because (1) the Lanham Act must remain in effect to accomplish the purposes for which it was enacted, and (2) in so far as it attempts or purports to cover the field of jurisdiction in the District Courts in simple actions for unfair competition without diversity of citizenship where such actions are not joined with a substantial and related claim under the copyright, patent or trademark laws, it must yield to the new Judicial Code, and to the extent of any repugnancy therewith, it is deemed to be superseded by said Code. (*Cook County National Bank, et al. v. U. S.*, 107 U. S. 445, 2 Sup. Ct. 561, 27 L. Ed. 537 at 539.) This is so, even though there is "no repealing clause to that effect." (50 Am. Jur. p. 559, Sec. 556.) There was no occasion or necessity for listing any provision of the Lanham Act in the schedule of repealed laws. In our view, the construction placed on said Act by this Honorable Court is strained and unrealistic as applied to the facts herein.

The Record Affirmatively Shows That Appellee Is Not Engaged in "Commerce."

Appellee is the owner of five "Stauffer Tables" acquired from appellant B. H. Stauffer in 1941. [Tr. p. 18, lines 12-16.] Said tables were sold, designated and described by said appellant as a "Stauffer Table." [Tr. p. 21, lines 11-12.] Appellee operates and conducts a reducing salon in the area and section of the City of Los Angeles known as Leimert Park, under the name "Sterling Slenderizing System," and in connection therewith uses various types of tables and equipment, including a "Tammen Table," "Multiple Oscillation" equipment and "Stauffer Tables." [Tr. p. 22, lines 3-10.] Commencing on or about the first day of February, 1946, and continuing up to the present time, appellee has not advertised "Stauffer System," nor has she represented nor held herself out to the public by advertising or otherwise as "Stauffer System." [Tr. p. 23, lines 7-12.] Appellee has developed a substantial goodwill in the reducing and slenderizing business in said area and section in the City of Los Angeles known as Leimert Park, and the patronage which she enjoys is due to her own industry, personal efforts and reputation in said community. [Tr. p. 24, lines 19-28.]

The record thus shows that appellee's activities are restricted to operating one reducing salon in the Leimert Park area in Los Angeles, and that during all of the time she has been in business her activities have been limited to that one area. The conduct of this one small business

does not and cannot possibly have any impact on interstate commerce. From these facts in the record the District Court's finding on the issue of appellee's activities in "commerce," if made, would necessarily have been adverse to appellants. Under such circumstances, the cause should not be remanded.

Re Costs.

Appellants, being responsible for the state of the record, should be ordered to pay their own costs. Under the circumstances here existing, it is unfair and inequitable to impose these costs on appellee.

Conclusion.

For the foregoing reasons a rehearing should be granted herein.

Respectfully submitted,

FRANK P. DOHERTY and

FRANK W. DOHERTY,

By FRANK P. DOHERTY,

Attorneys for Appellee.

Certificate of Counsel.

I, Frank P. Doherty, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

FRANK P. DOHERTY,

Attorney for Petitioner.

No. 12259

United States
Court of Appeals
For the Ninth Circuit.

SEATTLE HARDWARE COMPANY,
Appellant,
vs.

CLARK SQUIRE, Collector of Internal Revenue,
Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the
Western District of Washington, Southern Division,

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PAUL P. O'BRIEN,
Clerk

No. 12259

United States
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Western District of Washington, Southern Division

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ATTORNEYS OF RECORD

JONES & BRONSON,

A. R. KEHOE,

Attorneys at Law,
Colman Building,
Seattle 4, Washington,

For Plaintiff.

J. CHARLES DENNIS,

United States Attorney,
Tacoma, Washington.

THOMAS R. WINTER,

Special Assistant to the Chief Counsel,
Bureau of Internal Revenue,
713 Smith Tower,
Seattle, Washington,

For Defendant.

In the District Court of the United States for the
Western District of Washington, Southern Division

No. 1059

SEATTLE HARDWARE COMPANY,
Plaintiff,

vs.

CLARK SQUIRE, Collector of Internal Revenue,
Defendant.

COMPLAINT

Comes Now the plaintiff and complains of the defendant and for cause of complaint, alleges as follows:

I.

That plaintiff now is, and at all times herein mentioned has been, a corporation duly organized and existing under the laws of the State of Washington and lawfully authorized to maintain this action.

II.

That the defendant now is and since March 16, 1941, has been the duly appointed, qualified and acting Collector of Internal Revenue for the collection district of Washington, having his office and residing at the City of Tacoma in the jurisdiction of this court; that the acts done by the defendant as herein alleged were done by him in his representative capacity and under and pursuant to the direction of the Commissioner of Internal Revenue of the United States.

III.

That plaintiff keeps its accounts and makes its Federal Income Tax returns upon an accrual basis and upon a fiscal year basis commencing December 1 and ending November 30.

IV.

That for the fiscal year ending November 30, 1941, the plaintiff duly made and filed its Federal Income, Declared Value Excess Profits Tax, and Excess Profits Tax Returns under which it became liable to pay as income and excess profits taxes the sum of \$285,708.35, payment of which was made to the defendant in quarterly installments in 1942 and by additional assessment in the sum of \$26,220.07, which was paid to the defendant in January, 1945. Subsequently on August 27, 1945, the Commissioner of Internal Revenue determined an overassessment of \$646.87 and on June 10, 1946, determined an additional overassessment of \$5,057.43 and on June 19, 1946, the \$646.87 was refunded to plaintiff by defendant and on October 16, 1946, the \$5,057.43 was refunded to plaintiff by defendant. The net assessment against plaintiff after the adjustments indicated above for the fiscal year ending November 30, 1941, was therefore \$306,224.12. That for the fiscal year ending November 30, 1942, the plaintiff duly made and filed Federal Income and Excess Profits Tax Returns under which it became liable for such taxes in the sum of \$505,591.74, payment of which was made to the defendant in quarterly installments throughout 1943. Subsequently on a renegotiation for such year plaintiff was allowed a credit under

Section 3806 I.R.C. of \$48,082.02. Still later on June 10, 1946, the Commissioner determined a net overassessment of \$1,888.08. The net assessment against plaintiff after the adjustments indicated above for the fiscal year ending November 30, 1942, was \$455,621.64 and that was the amount used in determining the refundable amount in the claim for refund for such year referred to hereinafter. That for the fiscal year ending November 30, 1943, plaintiff duly made and filed its Federal Income and Excess Profits Tax Returns under which it became liable to pay such taxes in the sum of \$301,984.58, payment of which was made in quarterly installments during 1944. Subsequently on a renegotiation for such year plaintiff was allowed a credit under Section 3806 I.R.C. of \$72,000.00. Still later on June 10, 1946, the Commissioner determined a net overassessment of \$109.21.

The net assessment against plaintiff after the adjustments indicated above for the fiscal year ending November 30, 1943, was \$229,875.37 and that was the amount used in determining the refundable amount in the claim for refund for such year referred to hereinafter. That for the fiscal year ending November 30, 1944, the plaintiff duly made and filed its Federal Income and Excess Profits Tax Returns under which it became liable to pay as such taxes the sum of \$149,979.22, payment of which was made in quarterly installments in 1945. Subsequently on June 10, 1946, the Commissioner determined an overassessment of \$258.75. The net assessment against plaintiff after the adjustment in-

icated above for the fiscal year ending November 30, 1944, was \$149,720.47 and that was the amount used in determining the refundable amount in the claim for refund for such year referred to hereinafter. That for the fiscal year ending November 30, 1945, plaintiff duly made and filed its Federal Income and Excess Profits Tax Returns under which it became liable to pay as such taxes the sum of \$56,-664.08, payment of which was made in installments of one-quarter on February 15 and May 15 of 1946 and in one additional final installment of one-half on August 12, 1946.

V.

That taxpayer in 1945 sold certain land together with buildings thereon, known as Lots One (1) and Two (2), Block 327, Seattle Tide Lands, upon which sale taxpayer suffered a loss. That taxpayer is entitled to an additional invested capital credit for said land and building and an increase in the basis used for determining loss on the sale thereof based upon the following facts: During the years 1901 through 1905 the taxpayer owned all of the stock of the Occident Trust Company, a Washington corporation. The Occident Trust Company acquired the above described land on October 1, 1903, and during the years 1904 and 1905 it erected a building on said land. On February 21, 1906, the Occident Trust Company transferred the land and building to plaintiff in complete liquidation of the stock of the Occident Trust Company which was owned by plaintiff and thereafter the Occident Trust Company was dissolved by operation of law. The fair market value

of said land was \$224,322 and the fair market value of the building was \$297,502.70, as of February 21, 1906. That these fair market values as of February 21, 1906, together constitute the cost to plaintiff of said land and buildings and constitute its basis for invested capital purposes and for the purpose of determining the loss on the sale of said property.

VI.

That by reason of its failure to include the fair market value of said land and building as of February 21, 1906, in determining its basis with respect to gain or loss upon sale of said land and building and in determining its invested capital, plaintiff's income was overstated in its Income and Excess Profits Tax Returns for the years 1941 through 1945, inclusive, and Income and Excess Profits Taxes were overpaid by the plaintiff to the defendant during those years in the following amounts:

Year	Amount of Tax Overpaid
1941	\$ 6,736.42
1942	1,167.41
1943	95,377.68
1944	42,735.51
1945	56,664.08

On or about August 15, 1946, plaintiff filed with the defendant claims for refund of the amount shown above for each of the years indicated, which claims were forthwith transmitted to the Commissioner of Internal Revenue; that more than six months have

elapsed since the receipt of said claim by the defendant and the Commissioner of Internal Revenue; that the said claims have neither been allowed nor rejected; that copies of said claims are attached hereto marked Exhibits A to E, inclusive, and by this reference made a part hereof.

Wherefore plaintiff prays for judgment against the defendant in the sum of \$202,681.10, together with interest thereon at the rate of six (6) per cent per annum to be computed proportionately from the dates of payment as set forth in paragraph IV above, together with its costs and disbursements herein to be taxed, and for such other relief as to this Court shall appear just.

JONES & BRONSON.

State of Washington,
County of King—ss.

C. H. Black, being first duly sworn, on oath deposes and says: That he is President of Seattle Hardware Company, a Washington corporation, and plaintiff above named; that he is duly authorized to sign this complaint for said corporation; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true and correct.

/s/ C. H. BLACK.

Subscribed and Sworn to before me this 27th day of August, 1947.

[Seal] /s/ G. C. HOLDEN,
Notary Public in and for the State of Washington,
Residing at Seattle.

EXHIBIT A

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

State of Washington,
County of King—ss.

Name of taxpayer or purchaser of stamps, Seattle
Hardware Company.

Business address, 501-1st Avenue South, Seattle,
Washington.

The deponent, being duly sworn according to law,
deposes and says that this statement is made on be-
half of the taxpayer named, and that the facts given
below are true and complete:

1. District in which return (if any) was filed,
Tacoma.

2. Period (if for income tax, make separate form
for each taxable year) from Dec. 1, 1940, to Nov.
30, 1941.

3. Character of assessment or tax—Income and
excess profits tax.

4. Amount of assessment, \$311,928.42; dates of
payment, Quarterly in 1942 and by additional assess-
ment, \$26,220.07, paid Jan., 1945.

6. Amount to be refunded, \$6,736.42.

8. The time within which this claim may be le-
gally filed expires, under section 322 of Internal
Revenue Code, on January, 1947.

Taxpayer's claims for refund for 1941, 1942, 1943,

1944 and 1945 are premised on additional invested capital credit for land and building and additional basis for loss on the sale of its land and building in 1945. The facts establishing taxpayer's claim for refund are as follows:

During the years 1901 through 1905 the taxpayer, Seattle Hardware Company, owned all of the stock of the Occident Trust Company, a Washington corporation. The Occident Trust Company acquired the land, lots 1 and 2, block 327, Seattle Tidelands, on October 1, 1903. During the years 1904 and 1905 the Occident Trust Company erected the building on the land. On February 21, 1906, the Occident Trust Company transferred the land and building to the Seattle Hardware Company in complete liquidation of the stock of the Occident Trust Company owned by the Seattle Hardware Company, and thereafter the Occident Trust Company was dissolved by operation of law. The fair market value of the land was \$224,322, and the building, \$297,502.70, as of February 21, 1906. The \$224,322 and \$297,502.77 is taxpayer's cost and is its basis for invested capital purposes and for purposes of determining loss on the sale. See Sec. 113(a) I.R.C. and *Maltine Company*, 5 T. C. No. 152.

/s/ SEATTLE HARDWARE
COMPANY.

By
Pres.

By
Secy.

Seattle Hardware Company

SEATTLE HARDWARE COMPANY

Claim for Refund

1941

Excess Profits income per

R.A.R. 6.10/46..... \$517,042.06

Excess Profits tax credit, invested

capital basis per R.A.R. 6/10/46.....\$162,313.45

Add additional invested capital

Land\$170,002.10

Building\$53,502.70

Less Depr.

34/50 36,381.84 17,120.86

187,122.96

Additional credit at 8%.....

14,969.84

177,283.29

Specific exemption

5,000.00

182,283.29

Adjusted excess profits

net income

334,758.77

Tax on 250,000..... 91,500.00

Tax on 84,758.77 at 45%.. 38,141.45

129,641.45

Excess profits tax assessed

per R.A.R. June 10, 1946.. 136,377.87

Overassessment (6,736.42)

EXHIBIT B

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

State of Washington,

County of King—ss.

Name of taxpayer or purchaser of stamps, Seattle
Hardware Company.

Business address, 501-1st Avenue, South, Seattle,
Washington.

The deponent, being duly sworn according to
law, deposes and says that this statement is made
on behalf of the taxpayer named, and that the facts
given below are true and complete:

1. District in which return, (if any) was filed,
Tacoma.

2. Period (if for income tax, make separate form
for each taxable year) from Dec. 1, 1941, to Nov.
30, 1942.

3. Character of assessment or tax, Income and
excess profits tax.

4. Amount of assessment, \$457,509.72; dates of
payment, Quarterly in 1943; final $\frac{1}{4}$ Oct. 15, 1943.

6. Amount to be refunded, \$1,167.41.

8. The time within which this claim may be le-
gally filed expires, under section 3313 of Internal
Revenue Code, on October 15, 1947.

The deponent verily believes that this claim
should be allowed for the following reasons:

Taxpayer's claims for refund for 1941, 1942, 1943,

1944 and 1945 are premised on additional invested capital credit for land and building and additional basis for loss on the sale of its land and building in 1945. The facts establishing taxpayer's claim for refund are as follows:

During the years 1901 through 1905 the taxpayer, Seattle Hardware Company, owned all of the stock of the Occident Trust Company, a Washington corporation. The Occident Trust Company acquired the land, lots 1 and 2, block 327, Seattle Tidelands, on October 1, 1903. During the years 1904 and 1905 the Occident Trust Company erected the building on the land. On February 21, 1906, the Occident Trust Company transferred the land and building to the Seattle Hardware Company in complete liquidation of the stock of the Occident Trust Company owned by the Seattle Hardware Company, and thereafter the Occident Trust Company was dissolved by operation of law. The fair market value of the land was \$224,322, and the building, \$297,502.70, as of February 21, 1906. The \$224,322 and \$297,502.70 is taxpayer's cost and is its basis for invested capital purposes and for purposes of determining loss on the sale. See Sec. 113(a) I.R.C. and *Maltine Company*, 5 T. C. No. 152.

/s/ SEATTLE HARDWARE
COMPANY.

By
Pres.

By
Secy.

SEATTLE HARDWARE COMPANY

Claim for Refund

1942

Excess profits tax credit			
Equity invested capital, 1941			
per R.A.R. 6/10/46.....			\$1,906,512.61
Add income, F.Y. 1941, per			
R.A.R. 6/10/46	\$723,827.54		
Less income and			
E-P tax	\$306,224.12		
Dividends paid	239,460.00		
Contributions (un-			
allowable)	100.00	545,784.12	178,043.42
Equity invested capital			
before land and building			
adjustment			2,084,556.03
50% of average borrowed capital..			139,396.00
			<hr/>
			2,223,952.03
Less reduction for inadmissible			
assets			90,000.00
			<hr/>
			2,133,952.03
Adjustment for additional invested capital			
Land	170,002.10		
Building	53,502.70		
Less depreciation 35/50	37,451.89	16,050.81	186,052.91
	<hr/>	<hr/>	<hr/>
Invested capital			2,320,004.94
			<hr/>
Excess profits credit—8%			185,600.40
			<hr/>

Seattle Hardware Company

SEATTLE HARDWARE COMPANY

Claim for Refund

1942

Calculation of Tax

		Tentative Tax 1941	Tentative Tax 1942
Income tax			
Net income for D.V.E.P. tax per			
R.A.R. 12/11/45		\$722,454.66	
Less dividends received credit.....		22,771.76	
		<hr/>	
		699,682.90	\$699,682.90
Less: Tentative excess profits tax			
on 1941 rates		260,282.14	
Income subject to excess profits tax			510,470.23
		<hr/>	<hr/>
Normal and surtax income.....		439,400.76	189,212.67
		<hr/>	<hr/>
Surtax			
Taxable at 6%.....	25,000.00	1,500.00	
Taxable at 7%	414,400.16	29,008.05	
Taxable at 16%.....	189,212.67		30,274.03
		<hr/>	<hr/>
		30,508.05	30,274.03
Normal tax at 24%.....		105,456.18	45,411.04
		<hr/>	<hr/>
		135,964.23	75,685.07
Tax applicable			
212/365 of 1941.....	135,964.23	78,971.02	
153/365 of 1942.....	75,685.07	31,725.52	
		<hr/>	
		110,696.54	
Tax previously assessed,			
R.A.R. 6/10/46		110,005.02	
		<hr/>	
Deficiency		691.52	
		<hr/> <hr/>	

SEATTLE HARDWARE COMPANY

Claim for Refund

1942

Calculation of Tax

		Tentative Tax 1941	Tentative Tax 1942
Excess Profits Tax			
Excess profits net income, per R.A.R.			
6/10/46 (income credit basis).....		\$693,976.86	
Add 50% of interest on borrowed capital		7,093.77	
		701,070.63	
Less Specific exemption....	5,000.00		
Excess profits credit.....	185,600.40	190,600.40	
Adjusted excess profits net income.....		510,470.23	510,470.23
Tax on 500,000.00		254,000.00	
Tax on 10,470.23 at 60%.....		6,282.14	
Tax on 510,470.23 at 90%.....			459,423.21
		260,282.14	459,423.21
Tax applicable			
212/365 of 1941	260,282.14	151,177.59	
153/365 of 1942	459,423.21	192,580.10	
		343,757.69	
Tax previously assessed, R.A.R. 6/10/46		345,616.62	
Over-assessment		(1,858.93)	
Deficiency in income tax.....		691.52	
Net over-assessment		(1,167.41)	

EXHIBIT C

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

State of Washington,

County of King—ss.

Name of taxpayer or purchaser of stamps, Seattle
Hardware Company.

Business address, 501-1st Avenue South, Seattle, Washington.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed, Tacoma.

2. Period (if for income tax, make separate form for each taxable year) from December 1, 1942, to November 30, 1943.

3. Character of assessment or tax, Income and excess profits tax.

4. Amount of assessment, \$301,984.58; dates of payment, Quarterly in 1944.

6. Amount to be refunded, \$95,377.68.

8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code, on February 15, 1947.

The deponent verily believes that this claim should be allowed for the following reasons:

Taxpayer's claims for refund for 1941, 1942, 1943, 1944 and 1945 are premised on additional invested capital credit for land and building and additional basis for loss on the sale of its land and building in 1945. The facts establishing taxpayer's claim for refund are as follows:

During the years 1901 through 1905 the taxpayer, Seattle Hardware Company, owned all of the stock of the Occident Trust Company, a Washington cor-

poration. The Occident Trust Company acquired the land, lots 1 and 2, block 327, Seattle Tidelands, on October 1, 1903. During the years 1904 and 1905 the Occident Trust Company erected the building on the land. On February 21, 1906, the Occident Trust Company transferred the land and building to the Seattle Hardware Company in complete liquidation of the stock of the Occident Trust Company owned by the Seattle Hardware Company, and thereafter the Occident Trust Company was dissolved by operation of law. The fair market value of the land was \$224,322, and the building, \$297,502.70, as of February 21, 1906. The \$224,322 and \$297,502.77 is taxpayer's cost and is its basis for invested capital purposes and for purposes of determining loss on the sale. See Sec. 113(a) I.R.C. and *Maltine Company*, 5 T. C. No. 152.

SEATTLE HARDWARE COMPANY

Claim for Refund

1943

Net income, per R.A.R. 6/10/46.....	380,082.38
Less operating loss carry-back from 1945.....	40,307.27

Adjusted net income.....	339,775.11
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Income Tax Computation

Less: Income subject to excess profits tax—	
Dividends received credit.....	3,530.88

Normal and surtax income.....	336,244.23
Normal and surtax at 40%.....	134,497.69
Excess profits tax.....	

	134,497.69
Income and excess profits tax previously assessed, R.A.R. 6/10/46.....	229,875.37

Net over-assessment	(95,377.68)
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SEATTLE HARDWARE COMPANY

Claim for Refund

1943

Excess Profits Tax Computation

Excess Profits net income per R.A.R. 6/15/46.....	372,414.80
Less operating loss.....	40,307.27

Adjusted excess profits income.....	332,107.53
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Invested capital credit

Equity invested capital, 1942, per refund claim....	2,084,556.03
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Add income, F. Y. 1942 per R.A.R.

6/10/46	722,454.66
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Less income and E. P. tax per
refund claim

454,454.23

Dividends paid	240,000.00	694,454.23	28,000.43
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2,112,556.46

50% of average borrowed capital.....	98,140.00
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2,210,696.46

Less reduction for admissable assets.....	34,608.15
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2,176,088.31

Adjustment for additional invested capital

Land	170,002.10
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Building	53,502.70
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Less depreciation 36/50	38,521.94	14,980.76	184,982.86
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2,361,071.17

Excess profits credit—8%.....	188,885.69
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Excess profits credit carry back—1945.....	211,678.28
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Specific exemption	5,000.00
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Total excess profits tax credits.....	405,563.97
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Total excess profits tax credits (forward).....	405,563.97
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Adjusted excess profits income.....	332,107.53
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Subject to excess profits tax

EXHIBIT D

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

State of Washington,
County of King—ss.

Name of taxpayer or purchaser of stamps, Seattle
Hardware Company.

Business address, 501-1st Avenue South, Seattle,
Washington.

The deponent, being duly sworn according to law,
deposes and says that this statement is made on be-
half of the taxpayer named, and that the facts given
below are true and complete:

1. District in which return (if any) was filed,
Tacoma.

2. Period (if for income tax, make separate form
for each taxable year) from December 1, 1943, to
November 30, 1944.

3. Character of assessment or tax, Income and
excess profits.

4. Amount of assessment, \$149,720.47; dates of
payment, Quarterly in 1945.

6. Amount to be refunded, \$42,735.51.

8. The time within which this claim may be le-
gally filed expires, under section 322 of Internal
Revenue Code, on February 15, 1948.

The deponent verily believes that this claim should be allowed for the following reasons:

Taxpayer's claims for refund for 1941, 1942, 1943, 1944 and 1945 are premised on additional invested capital credit for land and building and additional basis for loss on the sale of its land and building in 1945. The facts establishing taxpayer's claim for refund are as follows:

During the years 1901 through 1905 the taxpayer, Seattle Hardware Company, owned all of the stock of the Occident Trust Company, a Washington corporation. The Occident Trust Company acquired the land, lots 1 and 2, block 327, Seattle Tidelands, on October 1, 1903. During the years 1904 and 1905 the Occident Trust Company erected the building on the land. On February 21, 1906, the Occident Trust Company transferred the land and building to the Seattle Hardware Company in complete liquidation of the stock of the Occident Trust Company owned by the Seattle Hardware Company, and thereafter the Occident Trust Company was dissolved by operation of law. The fair market value of the land was \$224,322, and the building, \$297,502.70, as of February 21, 1906. The \$224,322 and \$297,502.77 is taxpayer's cost and is its basis for invested capital purposes and for purposes of determining loss on the sale. See Sec. 113(a) I.R.C. and *Maltine Company*, 5 T. C. No. 152.

SEATTLE HARDWARE COMPANY

Claim for Refund

1944

Normal and surtax

Net income per R.A.R. 6/10/46..... 272,591.87

Less income subject to excess profits tax—

Dividends received credit 5,129.48 5,129.48

267,462.39

Normal and surtax at 40%..... 106,984.96

Excess profits tax.....

Total tax due..... 106,984.96

Income and excess profits tax previously

assessed, R.A.R. 6/10/46..... 149,720.47

Net over-assessment (42,735.51)

SEATTLE HARDWARE COMPANY

Claim for Refund

1944

Excess profits tax

Invested Capital credit, current year			
Equity invested capital, 1943, per refund claim....	2,112,556.46		
Add income, F.Y. 1943, per R.A.R.			
June 10, 1946.....	380,082.38		
Less Income and E-P tax per			
refund claim	134,497.69		
Dividends paid	88,725.00	223,222.69	156,859.69
			<hr/>
			2,269,416.15
50% of average borrowed capital.....			98,140.00
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			2,367,556.15
Less reduction for inadmissible assets.....			34,608.15
			<hr/>
			2,332,948.00
Adjustment for additional invested capital			
Land	170,002.10		
Building	53,502.70		
Less depreciation 37/50....	39,592.00	13,910.70	183,912.80
			<hr/>
			2,516,860.80
			<hr/>
Excess profits tax credit—8%.....			201,348.86
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Excess profits tax credit carry—forward—1943			
Excess profits credit—Invested capital basis 1943	188,885.69		
Excess profits credit—carry-back—1945.....	211,678.28		
			<hr/>
			400,563.97
Adjusted excess profits income, 1943, per			
refund claim	332,107.53		
			<hr/>
Credit carry-forward to 1944.....			68,456.44
			<hr/>
Excess profits credit summary			
Invested capital credit, current year.....	201,348.86		
Unused excess profits credit adjustment.....	68,456.44		
Specific exemption	10,000.00		
			<hr/>
Total credits	279,805.30		
Excess profits net income, per R.A.R. 6/10/46.....	272,142.52		
			<hr/>
Income subject to excess profits tax.....			

EXHIBIT E

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

State of Washington,

County of King—ss.

Name of taxpayer or purchaser of stamps, Seattle
Hardware Company.

Business address, 501-1st Avenue South, Seattle,
Washington.

The deponent, being duly sworn according to law,
deposes and says that this statement is made on be-
half of the taxpayer named, and that the facts given
below are true and complete:

1. District in which return (if any) was filed,
Tacoma, Washington.

2. Period (if for income tax, make separate
form for each taxable year) from Dec. 1, 1944, to
Nov. 30, 1945.

3. Character of assessment or tax, Income tax.

4. Amount of assessment, \$56,664.08; dates of
payment, Quarterly, Feb. 15, May 15, Last half Au-
gust 12, 1946.

6. Amount to be refunded, \$56,664.08.

8. The time within which this claim may be le-
gally filed expires, under section 322 of Internal
Revenue Code, on August 12, 1948.

The deponent verily believes that this claim
should be allowed for the following reasons:

Taxpayer's claim for refund for 1941, 1942, 1943,
1944 and 1945 are premised on additional invested

capital credit for land and building and additional basis for loss on the sale of its land and building in 1945. The facts establishing taxpayer's claim for refund are as follows:

During the years 1901 through 1905 the taxpayer, Seattle Hardware Company, owned all of the stock of the Occident Trust Company, a Washington corporation. The Occident Trust Company acquired the land, lots 1 and 2, block 327, Seattle Tidelands, on October 1, 1903. During the years 1904 and 1905 the Occident Trust Company erected the building on the land. On February 21, 1906, the Occident Trust Company transferred the land and building to the Seattle Hardware Company in complete liquidation of the stock of the Occident Trust Company owned by the Seattle Hardware Company, and thereafter the Occident Trust Company was dissolved by operation of law. The fair market value of the land was \$224,322, and the building, \$297,502.70, as of February 21, 1906. The \$224,322 and \$297,502.77 is taxpayer's cost and is its basis for invested capital purposes and for purposes of determining loss on the sale. See Sec. 113(a) I.R.C. and *Maltine Company*, 5 T. C. No. 152.

/s/ SEATTLE HARDWARE
COMPANY.

By

Pres.

By

Secy.

SEATTLE HARDWARE COMPANY

Claim for Refund

1945

Net Income per Income Tax Return.....		\$142,535.48
Less additional basis against sale of land and building		
Land		
Balance set up on books, 1906....	\$220,000.00	
Less amounts charged to surplus in prior years.....	160,000.00	
		<hr/>
Basis per return.....	60,000.00	
Appraisal of land at liquidation of Occident Investment Com- pany to taxpayer in 1906.....	224,322.00	
		<hr/>
Additional basis for land.....	164,322.00	
Additional improvement assess- ments charged to expense 1906-13	5,680.10	
		<hr/>
Total for land	170,002.10	
		<hr/>
Building		
Balance set up on books, 1906 (cost)	244,000.00	
Appraisal of land at liquidation of Occident Investment Com- pany to taxpayer in 1906.....	297,502.70	
		<hr/>
	53,502.70	
Less depreciation on 50 year life 38/50	40,662.05	
		<hr/>
Total for building.....	12,840.65	
Total additional basis for gain or loss on sale of land and building.....		182,842.75
		<hr/>
Operating loss		(40,307.27)
		<hr/> <hr/>

Seattle Hardware Company

SEATTLE HARDWARE COMPANY

Claim for Refund

1945

Invested Capital Credit Adjustment (for carry-back)

Invested capital per return

Adjustments for R.A.R.'s 1941-44,

6/10/46		\$2,308,104.80
1941 Income reduced.....	\$ 2,500.00	
Tax reduced	5,057.43	2,557.43
1942 Income increased.....	3,900.00	
Tax reduced	1,888.08	5,788.08
1943 Income increased.....	1,400.00	
Tax reduced	109.21	1,509.21
1944 Income reduced.....	1,100.00	
Tax reduced	258.75	(841.25)

Adjustment for refund claims, prior
years (tax over-assessments)

1941	6,736.42	
1942	1,167.41	
1943	95,377.68	
1944	42,735.91	146,017.42

2,463,135.69

2,463,135.69

Adjustment for additional invested capital

Land	170,002.10	
Building	53,502.70	
Less depreciation		
38/50	40,662.05	12,840.65
		182,842.75

Invested capital 2,645,978.44

Excess profits tax credit—8%..... 211,678.28

[Endorsed]: Filed Aug. 29, 1947.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Clark Squire, by his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, and in answer to the plaintiff's complaint admits, denies and alleges as follows:

I.

Paragraph 1 is admitted.

II.

Paragraph 2 is admitted.

III.

Paragraph 4 is admitted.

IV.

Paragraph 3 is admitted.

V.

Paragraph 5 is denied.

VI.

Paragraph 6 is denied, except that the second subparagraph of paragraph 6 is admitted.

Affirmative Defenses

In the event it should be held that the plaintiff is entitled to recover by reason of the allegations in its complaint such recovery should be limited and reduced to the extent that the amount of the over-

payments of excess profits tax has been claimed as a deduction in computing income tax and to the extent that such overpayments have furnished the basis for post-war refunds which have been allowed.

Defendant further alleges that interest is allowable on any gross overpayment of excess profits tax only to January 1, 1946, and the net overpayment bears interest thereafter.

Wherefore, having answered, the defendant prays that the plaintiff's complaint be dismissed and the defendant awarded his allowable costs.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of
Internal Revenue.

Copy received Jan. 8, 1948. Jones & Bronson,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 9, 1948.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This case came regularly on for pre-trial before the Honorable Charles H. Leavy, District Judge, on the 4th day of May, 1948. Plaintiff was represented by H. B. Jones and A. R. Kehoe, Attorneys at Law, Seattle, Washington, and defendant was represented by J. Charles Dennis, United States Attorney for the Western District of Washington, Thomas R.

Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, and Homer R. Miller, Special Assistant to the Attorney General, as his attorneys.

From the proceedings had and taken at said pre-trial hearing it appears:

1. This is an action brought under Section 24(5) of the Judicial Code as amended and as qualified by Section 3772 of the Internal Revenue Code as amended.

2. The complaint embraces a cause of action for income and excess profits taxes allegedly erroneously and illegally assessed and collected.

3. The parties have filed a stipulation of facts stating that for the purposes of this litigation, certain facts set out therein are to be taken as true, subject to objection as to materiality or relevancy of any facts stated, and the right of either party to party to introduce other evidence not inconsistent with the facts stipulated.

It Is Now Ordered:

1. That the facts stated in said stipulation are to be taken as true for the purposes of this case, subject to the right of either party herein to object to any facts stipulated on the ground of relevancy and materiality, and the right of either party to introduce further evidence not inconsistent with the facts stipulated.

2. The following is a brief abstract of the contentions of the respective parties:

(a) The plaintiff contends that in determining invested capital credit for purposes of computing excess profits taxes for the fiscal years ended November 30, 1941, through November 30, 1945, inclusive, and in determining basis for purposes of computing gain or loss on the sale of the property in the fiscal year ended November 30, 1945, plaintiff is entitled to a basis of cost for Lots 1 and 2 of \$224,322.00, and a cost for improvements of \$270,751.38, subject to adjustments, additions and depreciation.

In the alternative and in the event it is held the \$224,322.00 and \$270,751.38 cost is not applicable, then plaintiff contends that it is entitled to the cost per the books of Lots 1 and 2, viz., \$220,000.00 for purposes of determining invested capital credit for the fiscal years ended November 30, 1941, through November 30, 1945, inclusive, and for purposes of determining the basis to be used in computing gain or loss on the 1945 sale.

(b) The defendant contends that plaintiff acquired Lots Nos. 1 and 2 in April, 1901, at a cost of \$60,000.00 before additions and improvements. That the cost to plaintiff of constructing the building before adjustments covered by jeopardy assess-

ments hereinafter referred to, was \$244,000.00, and that such amounts have been properly used in plaintiff's returns and by the Commissioner of Internal Revenue in determining invested capital credit for the fiscal years ended November 30, 1941, to November 30, 1945, inclusive, and as an unadjusted basis for loss on the 1945 sale.

(c) Defendant further contends that although the evidence may show that the legal title of Lots 1 and 2 on which the building was constructed was carried in the name of Ira Bronson (plaintiff's attorney) from April 19, 1901, to October 1, 1903, and in the name of Occident Trust Company from October 1, 1903, to February 21, 1906, that plaintiff was during all of said time, in substance and reality, the owner of the property, and that the said Ira Bronson and the said Occident Trust Company were in truth and reality mere agents, nominees, or instrumentalities of the plaintiff, and held the title to the said property for and on behalf of the plaintiff and as plaintiff's agents, trustees, or nominees. Defendant consequently contends that for tax purposes it should be held that the defendant was in substance and reality the purchaser of the property in 1901 and as having constructed the building upon said property. Consequently, the cost should be determined by what was paid for the lots and for construction of the building, rather than by the fair market value of the land and building on the date said property was deeded to plaintiff by said Occident Trust Company.

(d) Defendant does not admit or concede that the Occident Trust Company was legally a wholly-owned subsidiary of the plaintiff, nor that there was a liquidation of said Occident Trust Company in February, 1906, as contended by the plaintiff to have been carried out by a distribution of its assets in liquidation in exchange for stock. Defendant does not admit or concede that there was a liquidation of the Occident Trust Company prior to the year 1909 when the corporate existence of said Occident Trust Company was terminated for non-payment of corporate fees.

(e) Defendant further contends that under the provisions of Sections 113(a)(11), 113(a)(15), and 112(b)(6), Internal Revenue Code, no gain or loss shall be recognized where property is received by a corporation distributed in complete liquidation of another corporation, or when property is acquired during an affiliation. It is contended that under said Sections that even if plaintiff is correct as to the proper cost basis of the property, no gain or loss being recognizable under the facts in this case, plaintiff would not be entitled to a deductible loss on account of the 1945 sale or to invested capital credit for the years 1941 to 1945, inclusive, except upon the basis of the original actual amounts expended for the land and construction of the building.

(f) Plaintiff's alternative contention is not covered by its claim for refund.

(g) The property acquired by plaintiff on or

about February 21, 1906, from Occident Trust Company was not property previously paid in for stock, as paid in surplus or as a contribution to capital within the provisions of Section 718(a) (2), Internal Revenue Code, so as to be includible in invested capital under Section 718, Internal Revenue Code, and said property did not constitute accumulated earnings and profits within Section 718(a) (4), Internal Revenue Code.

3. Either party herein shall have the right within such time as the Court shall hereinafter determine, to submit proposed findings of facts and conclusions of law.

4. Plaintiff herein is not entitled to recover on its claim for refund for the fiscal year ended November 30, 1942, for the reason that the claim was not filed within the time provided by statute.

5. The findings, conclusions, and judgment in the case at bar shall not be considered as *res judicata* as to any items embraced in or included in jeopardy assessments made by the Commissioner on or about April 27, 1948, for income taxes for the year ended November 30, 1943, in the amount of \$8,537.61, plus interest, and for the fiscal year ended November 30, 1945, in the amount of \$5,928.50, plus interest, and a proposed overassessment of excess profits taxes for the fiscal year ended November 30, 1943, in the amount of \$17,815.92, plus interest, except insofar as the findings, conclusions, or judgment in the case at bar specifically deter-

mine and decide the specific questions or issues involved in said jeopardy assessments or proposed overassessment, and both plaintiff and defendant herein expressly waive their right to plead or assert *res judicata* with respect to said jeopardy assessments and overassessment except to the extent herein stated.

6. It Is Further Ordered, that the issues to be tried at the hearing of this case shall be those set forth above in the contentions of the parties as contested issues. It was stipulated at the pre-trial by the parties herein and approved by this Court that after the Court has decided the contested issues, if and to the extent that the decision shall be favorable to the plaintiff, the defendant will propose a recomputation of taxes for the fiscal years ended November 30, 1941; November 30, 1943; November 30, 1944, and November 30, 1945, in accordance with this Court's decision, giving effect therein to any adjustments of the taxes which may be proper under the provisions of law, and if such computations are agreed to by the plaintiff herein, that shall become the basis for the judgment to be entered herein. If the parties are unable to agree on said recomputations, this Court reserves jurisdiction to decide the differences in a further and final hearing to be held at this Court's convenience. It is understood that in determining the amount of said judgment, the adjustments reflected in the jeopardy assessments and overassessment above referred to shall not

be considered, except to the extent stipulated herein.

Dated and entered this 4th day of May, 1948.

/s/ CHARLES H. LEAVY,

United States District Judge.

Approved this 3rd day of May, 1948.

/s/ A. R. KEHOE,

(Of Jones & Bronson),

Attorneys for Plaintiff.

/s/ J. CHARLES DENNIS,

United States Attorney.

/s/ THOMAS R. WINTER.

[Endorsed]. Filed May 4, 1948.

[Title of District Court and Cause.]

STIPULATION

The parties hereto by their respective attorneys hereby stipulate and agree that for the purposes of this litigation and upon any hearing of this cause, the following facts shall be taken to be true. The stipulation is subject to the right of either party to offer evidence at the trial of the case tending to establish other facts not inconsistent with these herein stipulated, and subject to the right of either party to object to any facts stipulated herein on the ground of irrelevancy or immateriality.

First

In Re Parties:

1. Seattle Hardware Company is a corporation duly organized and existing under the laws of the State of Washington. Its articles of incorporation were filed March 17, 1885, and it has been in continuous existence since that date.

2. Clark Squire, the defendant, now is and since March 6, 1941, has been, the duly appointed, qualified and acting Collector of Internal Revenue for the Collection District of Washington, having his office and residing at the City of Tacoma, in the jurisdiction of this Court; that the acts done by the defendant as herein stated were done in his representative capacity and under and pursuant to the direction of the Commissioner of Internal Revenue of the United States.

Second

In Re Return and Payment of Federal Taxes:

3. For the fiscal years ended November 30, 1941, to November 30, 1945, inclusive, plaintiff kept its books and records and filed its income, declared value excess profits, and excess profits tax returns on the accrual basis and on the basis of fiscal year ended November 30.

4. For the fiscal year ended November 30, 1941, plaintiff filed its corporation income, declared value excess profits, and defense tax returns indicating income taxes of \$156,604.62, and declared value excess profits taxes of \$3,711.21. Payments of these

amounts were made to the defendant in quarterly installments as follows: \$40,078.96 on February 14, 1942; \$40,078.95 on May 7, 1942; \$40,078.95 on August 6, 1942, and \$40,078.97 on November 11, 1942. There was likewise filed a corporation excess profits tax return for said fiscal year 1941 indicating an excess profits tax, after the correction of a mathematical error, of \$125,392.52. This amount was paid in installments as follows: \$31,373.13 on February 14, 1942; \$31,339.80 on May 7, 1942; \$31,339.80 on August 6, 1942, and \$31,339.79 on November 11, 1942. On a list of January 26, 1945, there were assessed for the fiscal year 1941 additional income tax of \$7,923.03, with interest of \$1,400.86 and additional declared value excess profits tax of \$2,332.80, with interest of \$412.46. These amounts totaling \$12,069.15 were paid on February 15, 1945. On a list of January 26, 1945, there was assessed additional excess profits tax for the fiscal year 1941 of \$15,964.24, with interest of \$2,822.61. These amounts totaling \$18,786.85 were paid on February 15, 1945. On Schedule No. 103052 signed by the Commissioner on January 31, 1946, a certificate of overassessment was issued allowing an overassessment of excess profits tax of \$646.87 and an overassessment of interest of \$114.37. On Schedule No. 112282 signed by the Commissioner on December 17, 1946, a certificate of overassessment was issued allowing overassessments for the fiscal year 1941 of income tax of \$560.41 and of interest of \$99.09, and of declared value excess profits tax of \$165.00 and of interest of \$29.17. Likewise on Schedule No. 112282 a certificate

of overassessment was issued allowing an overassessment of excess profits tax of \$4,332.02 and of interest in the amount of \$765.94.

5. For the fiscal year ending November 30, 1942, Seattle Hardware Company filed its corporation income and declared value excess profits tax return indicating an income tax due of \$111,791.47, and no declared value excess profits tax. This amount was paid in four installments as follows: \$27,947.87 on February 10, 1943; \$27,947.85 on May 10, 1943; \$27,947.85 on August 5, 1943, and \$27,947.90 on November 6, 1943. There was likewise filed a corporation excess profits tax return for the fiscal year 1942 indicating an excess profits tax due of \$393,800.27. This amount was paid in four installments as follows: 3 installments of \$98,450.08 each on February 10, 1943; May 10, 1943; August 5, 1943, and an installment of \$98,450.03 on November 6, 1943. With respect to income tax, Seattle Hardware Company was allowed an offsetting tax credit under Section 3806(b) of the Internal Revenue Code in the amount of \$4,536.84. With respect to excess profits tax, there was allowed an offsetting tax credit under Section 3806(b) of the Internal Revenue Code of \$43,545.18. A consent extending the period of limitation upon assessment of income and profits tax for the fiscal year 1942 to any time on or before June 30, 1947, was duly executed and filed by plaintiff herein.

On a list of November 29, 1946, there was assessed an additional income tax for the fiscal year 1942 in the amount of \$2,814.95, with interest of \$611.21.

These amounts totaling \$3,426.16 were paid on December 17, 1946, by credit appearing on Schedule No. 112282. On Schedule No. 112406 signed by the Commissioner on December 20, 1946, there was allowed an overassessment of excess profits tax of \$3,840.14, which, after a postwar credit reduction of \$199.62, came to a net amount of \$3,640.52.

6. For the fiscal year ending November 30, 1943, Seattle Hardware Company filed its corporation income and declared value excess profits tax return indicating an income tax due of \$72,937.42 and no declared value excess profits tax. This amount was paid in the following manner: 2 installments of \$18,234.36 each on February 15 and May 11, 1944, and 2 installments of \$18,234.35 each on August 5 and November 8, 1944. A corporation excess profits tax return for the fiscal year 1943 was likewise filed indicating an excess profits tax due of \$229,047.16. This amount was paid in four installments of \$57,261.79 each on February 15, May 11, August 5 and November 8, 1944. With respect to excess profits tax due there was allowed an offsetting tax credit under Section 3806(b) of the Internal Revenue Code in the amount of \$72,000.00. On list of November 29, 1946, there was assessed additional income tax of \$1,095.37, with interest of \$174.82. These amounts totaling \$1,270.19 were paid on December 17, 1946, by a credit appearing on Schedule No. 112282. On Schedule No. 112282 a certificate of overassessment was issued indicating an overassessment of excess profits tax in the amount of \$3,454.58 which by

reason of a postwar credit of \$345.46 was reduced to a net amount allowed of \$3,109.12.

7. For the fiscal year ending November 30, 1944, Seattle Hardware Company filed its corporation income and declared value excess profits tax return indicating an income tax due of \$75,649.21, and no declared value excess profits tax. This amount was paid in four installments as follows: 3 installments of \$18,912.30 each on February 9, May 8, August 11, 1945, and an installment of \$18,912.31 on November 15, 1945. A corporation excess profits tax return for the fiscal year 1944 was filed showing an excess profits tax due of \$74,330.01. This amount was paid in the following manner: 2 installments of \$18,582.51 each on February 9 and May 18, 1945, \$18,582.50 on August 11, 1946, and \$11,149.49 on November 15, 1945. The balance of \$7,433.00 was abated by reason of a postwar credit in that amount. On list of November 29, 1946, there was assessed additional income tax of \$270.14 with interest of \$26.91. These amounts were paid on December 17, 1946, by credit on Schedule No. 112282. On Schedule No. 112406 there was allowed an overassessment of excess profits tax for the fiscal year 1944 in the amount of \$1,871.72.

8. For the fiscal year ended November 30, 1945, Seattle Hardware Company filed its corporation income and declared value excess profits tax return indicating an income of \$56,664.08 and no declared value excess profits tax. This amount was paid as follows: \$14,166.02 on February 11, \$14,116.02 on

May 10 and \$28,332.04 on August 13, 1946. There was likewise filed a corporation excess profits tax return indicating no excess profits tax due.

Third

In Re Sale of Land, Building, Furniture and Fixtures:

9. In the fiscal year ending November 30, 1945, plaintiff sold Lots Nos. 1, 2, and 3, Block 327, Seattle Tidelands in King County, Washington, with improvements thereon, and certain furniture and fixtures, for the gross sales price of \$125,000.00, the selling expenses being \$4,584.30 and the net selling price being \$120,415.70. In its income tax return for 1945 plaintiff reported a loss on the sale of \$166,-847.16.

10. The basis for loss equivalent to that used in plaintiff's 1945 tax return but stated in greater detail, is as follows:

Cost of Lots 1 and 2		\$60,000.00
Paving		3,922.99
Lot 3		60,291.15
Paving		1,872.03
Building cost:	\$469,569.05	
Depreciation:	321,224.83	148,344.22
<hr/>		
Furniture and fixtures, cost	22,743.75	
Depreciation:	9,911.28	12,832.47
<hr/>		
Total		\$287,262.86

11. The loss was computed as follows:

Cost less depreciation	287,262.86
Selling price less expenses sale	120,415.70
	<hr/>
Loss reported	\$166,847.16

12. The table below sets forth the contentions of the plaintiff and defendant herein as to the correct basis before additions, depreciation, and adjustments for determining loss on property sold by plaintiff during the fiscal year ended November 30, 1945, and for determining the equity invested capital credit for excess profits tax purposes under Section 718, Internal Revenue Code.

Plaintiff

	Per Returns	Per Complaint or Claim	Defendant
Land	\$ 60,000.00	\$224,322.00	\$ 60,000.00
Bldgs.	244,000.00	297,502.70	244,000.00
Total	\$304,000.00	\$521,824.70	\$304,000.00

13. The loss on sale of land and buildings by taxpayer as allowed by the Commissioner of Internal Revenue in the determination of taxpayer's income and excess profits tax liability for the year ended November 30, 1945, was computed as follows:

Taxpayer's basis for determining loss, as

set forth above	\$287,262.86
Selling price less sale expenses	120,415.70
	<hr/>
Loss per return	\$166,847.16

Fourth

In Re Acquisition and Sale of Land and Building by Plaintiff:

14. The building account in the amount of \$244,000.00 with later additions and adjustments became the \$469,569.05 building cost used for purposes of determining gain or loss in reporting the sale in the 1945 Return. The \$244,000.00, with later additions, was likewise used for purposes of determining equity invested capital as it related to building costs in the returns for 1941 through 1945.

15. In its 1941 Income and Excess Profits Tax Return in reporting invested capital credit, Seattle Hardware Company used the book basis of Lots 1 and 2, namely \$220,000.00. The return was audited by the Commissioner of Internal Revenue and an additional assessment of \$26,220.27 was made on January 8, 1945, based in part on adjusting invested capital credit by reducing equity invested capital for Lots 1 and 2 from \$220,000.00 to \$60,000.00.

16. The ultimate taxes determined and paid for 1941, 1942, 1943, 1944 and 1945 were in part on the basis of a reduction in equity invested capital for Lots 1 and 2 to \$60,000.00.

17. The \$60,000.00 cost for Lots 1 and 2 was used by plaintiff for purposes of determining gain or loss in reporting the sale in the 1945 return.

18. It is further stipulated herein that the fair

market value as of February 21, 1906, of the land (Lots 1 and 2) was \$224,322.00, and of the building was \$270,751.38. Defendant does not admit that these values are correct as to any other date either before or after Feb. 21, 1906.

Fifth

In Re Claims for Refund:

19. It is further stipulated that the plaintiff herein filed claims for refund of income and excess profits taxes herein involved, which claims for refund were in words and figures as shown by exhibits attached to plaintiff's complaint herein.

20. That all of said claims for refund were timely filed except the claim for the fiscal year ended November 30, 1942, which claim for refund was barred by the Statute of Limitations. It is stipulated that because of the bar of the Statute of Limitations, plaintiff herein is not entitled to recover anything for the fiscal year ended November 30, 1942.

21. All the claims for refund were transmitted by the defendant herein to the Commissioner of Internal Revenue. More than six months have elapsed since the receipt of the claims by the defendant and the Commissioner, and said claims have neither been officially allowed or rejected by the Commissioner.

Sixth

Miscellaneous:

22. Plaintiff acquired Lot No. 3, Block 327, Seattle Tidelands, in 1919, for a cash payment of \$60,291.15.

23. It is further stipulated that in the event this Court decides the contested issues involved in any amount or to any extent in favor of the plaintiff herein, the defendant herein will prepare a recomputation of taxes for the fiscal years ended November 30, 1941, to November 30, 1945, inclusive, in accordance with this Court's decision, and will submit such recomputation to plaintiff herein with a view of attempting to reach an agreement upon the correct computation of the judgment to be entered herein. If the parties are unable to agree upon said computations, this Court hereby reserves jurisdiction to decide and pass upon any differences in further and final hearings to be held as determined by this Court.

24. It is stipulated by and between the parties that on or about April 27, 1948, the Commissioner of Internal Revenue made a jeopardy assessment against the plaintiff herein for income taxes for the fiscal year ended November 30, 1943, in the amount of \$8,537.61, plus interest of \$2,151.24, and for the fiscal year ended November 30, 1945, of \$5,928.50, plus interest of \$782.40. The Commissioner has also proposed an overassessment of excess profits taxes for the fiscal year ended November 30, 1943, in the amount of \$17,815.92, plus interest. It is further

stipulated by and between the parties herein that the final decision and judgment in the case at bar shall not be considered or construed by either party herein as being res judicata as to the deficiencies or overassessments above mentioned, except to the extent that the decision in the case at bar shall include the specific issues or questions involved in the jeopardy assessments or overassessments above mentioned, and both plaintiff and defendant herein expressly waive the filing, asserting, pleading, or contending in any future proceeding involving the jeopardy assessments or overassessments above referred to of any claim based upon the decision or judgment in the case at bar being res judicata, except to the extent above mentioned and referred to.

25. It is further stipulated and agreed that in the event the Court should decide the contested issues in this case in favor of the plaintiff herein in whole or in part that in computing and determining the correct amount of the judgment to be entered herein, any adjustments which are proper under the Revenue Laws of the United States on the basis of the Court's decision may be made and considered in the making of said computations.

Dated at Seattle, Washington, this 3 day of May, 1948.

A. R. KEHOE

JONES & BRONSON BY

A. R. KEHOE,

Attorneys for Plaintiff.

J. CHARLES DENNIS,
United States Attorney.

THOMAS R. WINTER,
Assistant to the Chief Coun-
sel, Bureau of Internal
Revenue.

HOMER R. MILLER,
Special Assistant to the At-
torney General.
Attorneys for Defendant.

[Endorsed]: Filed May 4, 1948.

In The District Court of the United States for the
Western District of Washington, Southern
Division.

No. 1059

Seattle Hardware Company,

Plaintiff,

vs.

Clark Squire, Collector of Internal Revenue,
Defendant.

DEPOSITION OF ROY P. BALLARD

Be It Remembered, that on Tuesday, May 4, 1948,
9:30 a m., at Doctors Hospital, Seattle, Washington,
before Bruce Moburg, Notary Public in and for the
State of Washington, appeared Roy P. Ballard, a
witness on behalf of Plaintiff herein.

(Deposition of Roy P. Ballard.)

The Plaintiff appearing by H. B. Jones, Esq., and A. R. Kehoe, Esq., of Messrs. Jones & Bronson, its attorneys and counsel;

The Defendant appearing by Homer R. Miller, Esq., and Thomas R. Winter, Esq., its attorneys and counsel;

Whereupon, the following proceedings were had:

Mr. Jones: The deposition of R. P. Ballard, witness on behalf of the Plaintiff, is taken pursuant to stipulation.

Mr. Miller: We understand that the rules will govern as far as objections are concerned; we can object to anything except the form of the question, under the rules, at the trial.

Mr. Jones: Yes, that is all right.

ROY P. BALLARD,

being first duly sworn to testify the truth, the whole truth and nothing but the truth, deposed and said as follows:

Direct Examination

By Mr. Jones:

Q. State your name.

A. Roy P. Ballard.

Q. Where do you live?

A. 28, ——no, ——2345-31st South, Seattle.

Q. You are presently confined by an accident to a hospital here in Seattle and are unable to go to Tacoma for the trial today of this Seattle Hardware Company case, are you, Mr. Ballard?

(Deposition of Roy P. Ballard.)

A. That is correct.

Q. Will you state your age? [2*]

A. 74 years last December 12th.

Q. What is your position or connection with the Seattle Hardware Company?

A. I am at present secretary and have been a stockholder for 35 or 45, —45 years or more.

Q. And have you been continuously connected with the company during all that time?

A. Actively connected since 1897, when I graduated from college.

Q. What was your position with the company just generally from say 1901 to 1906?

A. In charge of the builder's hardware department, — contract builders hardware.

Q. Were you a trustee of the company during that time?

A. The records will show when I was elected trustee. I don't remember the exact year. They will also show when I became a stockholder.

Q. You are the R. P. Ballard who is mentioned in the minutes as a trustee? A. Yes.

Q. Were you related to any of the executive officers of the company? A. At what time?

Q. Well, say from 1901 to 1906? A. No.

Q. Who was M. D. Ballard?

A. He was my father, but he was not an executive officer. He was a trustee of the company, but not active.

* Page numbering appearing at foot of page of original Reporter's Transcript.

(Deposition of Roy P. Ballard.)

Q. How closely were you connected with the executive officers during that period?

A. Well, Mr. Burwell's father was vice-president and general manager and I was very closely connected with him. I had charge of one of the most important departments in the retail store at that time on account of the growth of the city, so much builders hardware being required and used. It was quite a feature of our business.

Q. Do you recall the formation of a corporation under the laws of the State of Washington known as Occident Trust Company? A. I do.

Q. What was the occasion for forming that company, if you know?

A. We formed that company to act as a holding company, real estate holding company in order that we might not have to spoil the looks of our financial statement by the borrowing that it would be necessary to do in buying the property and building a building.

Q. Do you recall whether there were any other reasons for forming the company besides what you have just [4] mentioned?

A. Not that I know of.

of the matter of risk of liability for claims in connection with building construction?
of the matter of risk or liability for claims in connection with building construction?

A. Claims against the company, you mean?

Q. That might arise in connection with construction.

(Deposition of Roy P. Ballard.)

A. Well, that again was just considered the same thing; in other words, we protected the Seattle Hardware Company as a hardware store against undue financial risk.

Q. My question is whether any consideration of that kind was in the minds of the executives of the Seattle Hardware Company as expressed to you as the reason for forming the Occident Trust Company?

A. I don't know that anything definitely was so expressed. It so happened that we did, however.

Q. Did what?

A. There was a claim against the Occident Trust Company which otherwise would have been against the Seattle Hardware Company, a claim for personal injuries. It was settled and didn't amount to anything but it might have amounted to a lot.

Q. Can you tell us who these gentlemen were who appear, according to the records, as the officers of Occident [5] Trust Company: M. D. Ballard, C. H. Black and F. W. Baker,—what was their relation to Seattle Hardware Company?

A. M. D. Ballard was the first president of Seattle Hardware Company. He had retired at this time when the Occident Trust Company was formed, and Mr. C. H. Black was president of the company, but when they formed the Occident Trust Company they elected father president. C. H. Black was vice-president I believe and F. W. Baker was treasurer. He was our treasurer in the Seattle Hardware Company.

(Deposition of Roy P. Ballard.)

Q. Have you made a search to see if you could find the stock certificates of the Occident Trust Company or any stock ledger?

A. That is the most I have been doing for the last three months.

Q. Were you able to locate any such papers?

A. No.

Q. Do you know whether stock was issued or the stock of the Occident Trust Company?

A. No.

Q. Do you recall having seen the certificates or not? A. No, no.

Q. Do you know who was then recorded as the owner of the stock of Occident Trust Company; and when I say that, [6] I mean in 1904 and '5 and '6?

A. The owners of the stock of the——

Q. Of the Occident Trust Company, yes.

A. It has been my thought all the time that the Seattle Hardware Company was the owner. I have good reasons for that, which I can supply later.

Q. Will you state your reasons?

A. Well, it was necessary to borrow money naturally to build a building of that size and expense, and the deal was made with G. Alston Hole representing the Travelers Insurance Company, and when we made the loan with the Travelers Insurance Company it was necessary,—when we effected the loan it was necessary to give the Travelers Insurance Company guarantees other than the property

(Deposition of Roy P. Ballard.)

itself because of the fact that the Occident Trust Company had no assets other than the property and the prospective building that they would erect with this money, therefore the individual stockholders of the Seattle Hardware Company signed the notes, —endorsed the notes,—of which I was one of the stockholders. Those notes we have in evidence, I suppose.

Q. You said that the Occident Trust Company had no assets other than its real estate——

A. Not to my knowledge. [7]

Q. And there was a building erected on that property. Lots 1 and 2, Block 327, Seattle Tide Lands, was there not?

A. Prior to our acquiring it, you mean, or at this particular time?

Q. Well, that building was erected, I think the record shows, along in 1904 or '5; is that your recollection?

A. That's right; completed in 1905.

Q. What I wanted to ask you particularly was this: aside from the land and the building, did Occident Trust Company ever have any other assets? A. Not that I know of.

Q. Were you in position to know whether they did or not?

A. Naturally; being a director of it and a stockholder.

Q. The record shows that in February of 1906, the property, that is, the real estate and buildings,

(Deposition of Roy P. Ballard.)

were transferred by the Occident Trust Company to the Seattle Hardware Company. Do you remember the occasion or the reason for doing that?

A. No, I don't.

Q. Have you looked at the minutes relating to that transaction,—the minutes of Seattle Hardware Company?

A. I read all the minutes of the Seattle Hardware Company within the last month but I don't recall that being [8] covered, although it no doubt was.

Q. There is reference in some of the books of account to the cash book of the Seattle Hardware Company,—well, it would be cash book No. 9 or cash books prior to No. 10, which I believe is not available. Have you made a search for that cash book?

A. Not only one, but three.

Q. And were you able to locate it?

A. We were not.

Q. Do you have any idea what has become of it?

A. No, or I would have found it long ago and got the trouble over with.

(Discussion off the record.)

Q. Mr. Ballard, I am referring to page 30 of the minute book of the Seattle Hardware Company which contains minutes of a trustees' meeting following a stockholders' meeting on February 20, 1906.

A. That was practically at the completion of the new building.

(Deposition of Roy P. Ballard.)

Q. Yes. And it contains this that I will read you: "It was then moved by C. H. Black and supported by F. W. Baker that the capital stock be made fully paid by increasing the valuation of real estate on their books [9] \$100,000, making the book value thereof \$225,000, this being considered a fair and reasonable valuation based on recent sales of property in the immediate vicinity and that escrow stock notes be retired. Unanimously carried. It was further moved and carried that real estate be transferred from Occident Trust Company to this company but deed not placed of record for the present."

What I want to ask you relative to that is with regard to the real estate which is mentioned there. Do you know what real estate that refers to?

A. Yes.

Q. What was it?

A. Lots 1 and 2, Block 327, Seattle Tide Lands. I remember that meeting very well, also.

Q. Do you have anything to add to what is shown in the minutes with respect to the authorization to transfer the real estate from Occident Trust Company to the Seattle Hardware Company, as to the occasion of its being done at that time?

A. I don't know of anything that I can state under oath, no.

Q. There is some reference in some of the records to an Occident Investment Company. Was there ever any corporation in which Seattle Hard-

(Deposition of Roy P. Ballard.)

ware Company was [10] interested known as Occident Investment Company?

A. No, there never was. There was a lot of confusion of names, just loose talk, you might say. We were not too very accurate about it, but there was never an Occident Investment Company. And it persists until this day, too.

Q. Do you know whether, after the transfer of the assets of Occident Trust Company to the Seattle Hardware Company in February, 1906, that the license fees of the Occident Trust Company were kept up or not? A. I don't know.

Q. You do not?

A. No, I don't know how long they were kept up. I know they were allowed to lapse after a certain time, but I don't know the dates.

Q. Did the Occident Trust Company do anything in connection with any business activity after transferring that property to the Seattle Hardware Company? A. Not that I recollect.

Mr. Jones: I think that is everything.

Cross-Examination

By Mr. Miller:

Q. Mr. Ballard, were you acquainted with Mr. Ira Bronson? [11] A. Yes, very well.

Q. He was attorney for the Seattle Hardware Company, wasn't he? A. He was.

Q. The deed to the lots 1 and 2 was first taken in his name? A. That's right.

(Deposition of Roy P. Ballard.)

Q. And it was held in his name for some time thereafter, wasn't it?

A. I don't know how long, but there was a period of time when it stood in his name, yes.

Q. And then the property was deeded by Mr. Bronson over to the Occident Trust Company after a period of time, is that right?

A. That is correct.

Q. And then in February, 1906, the property was deeded to the Seattle Hardware Company by the Occident Trust Company?

A. That is when we moved into the new building, yes, sir.

Q. Now can you state when the new building was completed, approximately?

A. Well, off the record a minute. (Discussion off the record.) I would say we moved into the new building April 1, 1906.

Q. And then the building, I assume, had been completed [12] shortly before that? A. Yes.

Q. Early in 1906?

A. February, perhaps.

Q. So you received,—that is, the Seattle Hardware Company received title to the lots and the building about the time that the building was completed? A. That is it.

Q. Why was the property first placed in the name of Mr. Bronson?

A. He acted as our attorney and made the deal with Stetson Post. Stetson Post was a little tough

(Deposition of Roy P. Ballard.)

to deal with, and any tough deal we turned over to our lawyers.

Q. Was the property carried in Mr. Bronson's name as attorney for the Seattle Hardware Company? A. Yes.

Q. Mr. Bronson, himself, did not own the beneficial interest in the property?

A. As far as I know, he did not.

Q. Now, he was one of the incorporators?

A. He was, yes.

Q. And the other two incorporators were Mr. Dana Brown and Lawrence Moore?

A. Yes, sir. [13]

Q. And who were those people?

A. Dana Brown—are you a Seattle man?

Q. No, I am not.

A. Well, I was going to make a comparison; but he was a representative of one of the local steamship companies,—ferry lines, and Mr. Bronson was their attorney, so we used Mr. Brown as one of the incorporators. Mr. Lawrence Moore was a partner in the jewelry business with Mr. Black who was a member of our company, and he and Mr. Black arranged with Mr. Bronson to use Lawrence Moore as a third incorporator.

Q. Now, those parties were not in any way interested? A. No.

Q. Now I think you testified that this Occident Trust Company was organized for the purpose of holding title to the lots? A. That's right.

(Deposition of Roy P. Ballard.)

Q. And of course the building that was built thereon; and Occident was the trade name of the Seattle Hardware Company, wasn't it?

A. You mean as a trademark?

Q. As a trademark.

A. It was,—I don't believe it was that early that we adopted that as a trademark. However, Occident was representative of the west. [14]

Q. Had it been used by the Seattle Hardware Company as a trade name?

A. Yes. I don't know when we first began to use it. I am unable to state.

Q. Now your duties in the company, as I understand it, were mostly in the selling end of the corporation?

A. Buying and selling of builders hardware.

Q. And you were in charge of one of the departments of the company?

A. That's right,—at this time.

Q. At this particular time? A. Yes.

Q. When did you become secretary of the company?

A. The records will show that. I don't remember the exact date.

Q. It was after 1906, wasn't it? A. Yes.

Q. And you had nothing to do with the keeping of the books of the company? A. I did not.

Q. Or in the paper work that was done by the company? A. No.

Q. You were on the board of trustees of the Seattle Hardware Company? A. Yes. [15]

(Deposition of Roy P. Ballard.)

Q. But you were not on the board of the Occident Trust Company? A. No.

Q. Now did the Occident Trust Company,—did it have an office of its own? A. No.

Q. As far as you know did it have or keep any particular books separate and apart from the books of the Seattle Hardware Company?

A. Not that I know of.

Q. And you have never seen any of the stock certificates that were actually issued?

A. No,—if there were any issued.

Q. And when the property was turned over by deed in 1906—deeded back to Seattle Hardware, you didn't see any stock certificates cancelled at that time? A. No.

Q. Or surrendered by anyone or officially marked "cancelled" as a result of that? A. No.

Q. Now in that meeting that was held in 1906 that Mr. Jones asked you about,—February, 1906, which you attended,—a meeting of the trustees of the Seattle Hardware Company, it is noted that the deed to the property was not to be recorded for the present. Do [16] you remember that?

A. Yes.

Q. As a matter of fact, it was not recorded for about two years afterward, was it?

A. I don't know how long. Not for some time.

Q. Why was that that the deed was not to be recorded; do you know of any reason?

A. The only reason I can advance for that with

(Deposition of Roy P. Ballard.)

any degree of certainty is that there were certain stipulations—contractual arrangements made with various firms for supplying material or doing work which was not completed. I can give you an example of that if you wish one.

Q. At the time, with Occidental?

A. Yes, in connection with the building.

Q. And the purpose of that was to avoid any liability on the part of Seattle Hardware on these obligations?

A. The contract was made with Occident Trust Company, and if that Company went out of business right away we might have difficulty in enforcing the contract. For instance, the glass specified in the building, all the window glass was to be triple-A glass.

Q. Yes.

A. And W. P. Fuller Company took the contract, —we considered them a reliable concern, and they were, and [17] when it came time to put in the glass they couldn't produce it, and we let them put in temporarily double-A glass, which they did. We held them to go ahead and complete their contract according to specifications. They tried for over a year and finally had to come to us and say, "We can't do it, the factories don't make it any more; and, will you compromise with us and we will settle it?" That is a sample of what I mean.

Q. Was it your purpose and intention to hold Occident open?

(Deposition of Roy P. Ballard.)

A. Until the building was actually completed and all the bills paid on it.

Q. And that took some time after 1906?

A. Yes, that's right.

Q. In fact, all of it was not wound up and completed until sometime in 1908, was it, or somewhere around there?

A. Probably around that time, yes.

Q. Now there were some old buildings on the land, these lots, when they were first acquired in 1901?

A. Yes.

Q. Do you know who collected the rents on those old buildings?

A. Jones & McCoy were tenants, and ran a grocery store. [18]

Q. They paid the rents in to Seattle Hardware Company, didn't they?

A. Yes.

Q. Who put up the money, if you know, for the purchase of Lots 1 and 2,—who advanced the money?

A. I haven't the slightest idea.

Q. You had no connection with that particular department?

A. No.

Q. You are satisfied that Mr. Bronson didn't advance it himself?

A. Well, I don't think so. Lawyers aren't usually that dumb.

Q. Do you know whether it was advanced by the Seattle Hardware Company?

A. No, I don't.

(Deposition of Roy P. Ballard.)

Q. And do you know in whose name the fire insurance policies were carried on the property,—that is, on the old buildings that were on it?

Mr. Jones: At what time?

Mr. Miller: In 1901 and shortly thereafter?

A. I don't believe there was any fire insurance carried.

Q. (By Mr. Miller): They didn't carry any?

A. Just a bunch of shacks.

Q. Who handled the negotiations for the purchase of these [19] lots, Lots 1 and 2?

A. C. H. Black, F. W. Baker.

Q. They were officials of the Seattle Hardware Company?

A. Yes, and of the Occident Trust Company.

Q. Who handled the contract with the architect for the construction of the new building?

A. Actually I did, but theoretically Mr. C. H. Black did. I was the cub. I did the footwork for Mr. Black.

Q. Did you have a written contract with the architect?

A. Yes; not on a percentage basis, but on a lump sum.

Q. Do you know where that contract is?

A. No, I don't.

Q. And you do not have any copies of that contract, and you have never been able to find any?

A. No.

Q. And that was a contract with Mr. Wickersham?

A. A. Wickersham.

(Deposition of Roy P. Ballard.)

Q. And you were appointed as a building committee by the Seattle Hardware Company?

A. That's right.

Q. And was the contract made in the name of the Seattle Hardware Company or the Occident Trust Company, if you know?

A. All the negotiations, as far as the public knew, were [20] Seattle Hardware Company, but we were acting for the Occident Trust Company.

Q. Do you remember how the contract was signed? A. No, I don't.

Q. Was the Occident Trust Company ever held out to the public in any way as a corporation?

A. No.

Q. Did its name ever appear in any telephone directories, as far as you know?

A. I don't think so; not that I know of.

Q. And it had no other duties except the mere holding of the title to this property?

A. That is my understanding.

Q. Did Occident Company have any salaried employees of its own except those that were already paid by the Seattle Hardware Company? There were no separate employees for Occident?

A. Of course, the foreman of the building,—the building construction, and all those people were employees of the Occident Trust Company.

Q. That is, they were paid for the construction of the building?

A. Yes. Do you mean permanent employees?

(Deposition of Roy P. Ballard.)

Q. Yes.

A. No, not that I know of. [21]

Q. And they were paid pursuant to contract for the construction of the building?

A. That's right.

Q. Now, was it the intention, as far as you know, that as soon as this building was completed that it would be transferred back to the Seattle Hardware Company,—the property?

A. That was my understanding.

Q. It was your understanding, then, that Occident was to hold the title to the lots until the building was completed? A. That's it.

Q. And then the property was to be transferred back to Seattle Hardware Company?

A. At some time in the future; the exact date we didn't know.

Q. Was that all to be about the time the building was completed, as far as you know?

A. I don't think I would be able to identify that.

Q. Did you hear some talk or discussion of that at some of the previous meetings?

A. Yes, it was understood in a general way.

Q. It was understood that the holding of that property was to be temporary by Occident?

A. That's right. [22]

Q. And shortly after the building was completed it was to go back to Seattle?

A. That was my understanding.

(Deposition of Roy P. Ballard.)

Q. Were there any dividends ever formally declared by the Occident?

A. No, neither formally nor informally.

Mr. Miller: I think that is all.

Redirect Examination

By Mr. Jones:

Q. Mr. Miller asked you about the matter of holding out to the public of the Occident Trust Company as a separate corporation. Was there any concealment of the Occident Trust Company's separate identity?

A. No. And I don't know whether Mr. Miller and I understand each other fully as to holding out to the public. What I meant was that we didn't want to use the Occident Trust Company's name around here in Seattle as if we were trying to camouflage or get behind it. When you come to holding out to the public, the Travelers Insurance Company from whom we borrowed the money is the public.

Q. Didn't you have a lot of business transactions with people in the name of the Occident Trust Company? [23]

A. Oh, a lot of them. But, when we went to execute those transactions it was not specifically stated, "Now, remember, you are dealing with the Occident Trust Company, you are not dealing with the Seattle Hardware Company." We went on the theory that was a fact that would naturally be

(Deposition of Roy P. Ballard.)

brought out or developed as time went on. We were not trying to conceal it, neither were we trying to publicize it.

Q. Do you know of the reason, if there was any, for withholding the filing of the deed from Mr. Bronson to the Occident Trust Company?

A. No.

Q. Or withholding of the filing of the deed from the Occident Trust Company to the Seattle Hardware Company?

A. Well, I stated a possible reason for that. On claims, or unfinished contract—I thought maybe that had something to do with it.

Q. I would like to know whether you know about that or whether that is your present supposition.

A. Well, I know that,—I know of a controversy with W. P. Fuller & Company, because that was quite active, and I remember one or two minor claims in an unfinished state, but my special personal knowledge of the others, other than Fuller,—I do remember [24] that, because I helped make the original deal with Fuller & Company.

Q. All I wanted to get at was this: When the transfer was made from Occident Trust Company to Seattle Hardware Company in February of 1906, did the Occident Trust Company have any other property or assets left after that time?

A. No, not to my knowledge.

Q. Was there any change then in the handling

(Deposition of Roy P. Ballard.)

of the building and property account as a result of that transfer?

A. Now you are talking bookkeeping and I don't know how they kept the books.

Mr. Winters: The books would be the best evidence.

Mr. Jones; Yes, that is probably right.

Q. (By Mr. Jones) There was one other thing you said in answer to Mr. Miller's question, about there being, as you recall it, some understanding as to the time when the lots and building would be transferred from Occident Trust Company to the Seattle Hardware Company; what do you recall specifically of any such arrangement or understanding?

A. Merely the fact that we considered the Occident Trust [25] Company a holding company; not to be mixed up or confused with the Seattle Hardware Company operation in any way. There was no object in further continuing to use the Occident Trust Company except in connection with something on real estate which we didn't have,—at that time we didn't have anything other than this one piece of property.

Q. What discussion, if any, was there as to when the real estate would be transferred to the Seattle Hardware Company? Do you have anything definite in mind as to that? A. No.

Q. You said in answer to Mr. Miller's questions that, in fact, the holding of the property was to

(Deposition of Roy P. Ballard.)

be merely temporary and that it was to be transferred back to the Seattle Hardware Company at some time. What I would like to know is what specific discussion or consideration can you now recall on that subject?

A. None other than the fact that that was a land company or real estate holding company, and as I said before, was not to be confused in any way with operation of the Seattle Hardware Company. The Seattle Hardware Company was incorporated as a hardware store, and as soon as it took title to the property and there was no longer any confusion as to construction or [26] real estate matters, then the Occident Trust Company would cease to function and the Seattle Hardware Company would carry on.

Q. And when, as you understand it, did that time come?

A. Well, I think the minutes will show when we made a settlement with W. P. Fuller, and it was shortly after that. That was the last, no doubt,—we had a tough architect—a toughy,—and he hung on like a bulldag until we got that settled. After that I don't remember anything else that made it necessary to hold out.

Mr. Miller: I would like to have you complete your answer.

A. (Continuing) Probably that was 18 months to two years after that. But the records will show when that settlement with Fuller took place.

(Deposition of Roy P. Ballard.)

Q. (By Mr. Jones) Did the Occident Trust Company in fact engage in any business transactions after it conveyed the property in February of 1906? A. Not to my knowledge.

Mr. Jones: I think that is all.

Recross-Examination

By Mr. Miller:

Q. Did the Seattle Hardware Company own any other real [27] estate at this particular time?

A. The Seattle Hardware Company?

Q. That's right.

A. Not unless they took it in on a bad debt or something like that.

Q. I call your attention to a receipt for the payment of taxes for the year 1903.

(Documents marked Defendant's Exhibits 1 and 2, deposition of Roy P. Ballard.)

Q. (By Mr. Miller) I want to show you, Mr. Ballard, receipts from the Treasurer's Office of Seattle, King County, Washington.

A. To whom?

Q. Made out to Mr. Baker, showing payment of taxes on four pieces of property in addition to the Lots 1 and 2 here involved. Would you look at this and tell us what those lots were?

A. Seattle Tide Lands are the first two on there, and then there is Kent,—Kent and Burk's Addition,—Burk's Second Addition, I guess it is and I don't know what that next one is. That was

(Deposition of Roy P. Ballard.)

evidently not acquired intentionally because the valuation of the whole piece is less than \$300. [28]

Q. Were those lots that you took in some sort of mechanic's lien foreclosure or bad debts?

A. Bad debts. I think Mr. Baker was treasurer of the company and handled the bad accounts.

Q. And those lots were never turned over to the Occident Trust Company?

A. Oh, no.

Mr. Jones: Pardon me, did he testify that those lots, other than one and two, belonged to Seattle Hardware Company?

Mr. Miller: Well, he didn't testify to it.

A. I don't know if they did,—but we paid the taxes.

Q. (By Mr. Miller) But you are not certain whether they belonged to Seattle Hardware Company?

A. No, we might have paid the taxes to protect our claim.

Q. Now the same thing is true as to the lots appearing on Defendant's Deposition Exhibit No. 2 relating to certain lots in Kent's Nob Hill Addition?

A. Kent is a little town about halfway between here and Tacoma.

Q. And to the best of your knowledge those were payments, either to protect your rights in those lots or payments on lots you had taken in for bad debts?

(Deposition of Roy P. Ballard.)

A. That is correct. [29]

Mr. Miller: Well, we won't introduce them now, but we probably will at the trial. That's all.

Redirect Examination

By Mr. Jones:

Q. Do you know whether the payment of taxes by Mr. Baker on the tracts that Counsel was just asking you about had anything to do with Seattle Hardware Company?

A. No, only that they put them both on the same tax receipts. Mr. Baker, if he was doing it for his own personal account, wouldn't be likely to confuse them with Seattle Hardware Company. It wouldn't be good business. He would want his own separate receipts.

Q. As far as you know, what was the interest of Seattle Hardware Company or its relation to these tracts in Kent's Nob Hill Addition or Burk's Addition or the supplemental plat of Burk's Addition?

A. No relation that I know of. I am unable to state any position the Seattle Hardware Company had in the picture.

Q. Mr. Baker was quite a prominent business man, as I understand it? A. Yes.

Q. And he may have owned property in his own name, is [30] that correct?

A. He might, but that district doesn't indicate that.

(Deposition of Roy P. Ballard.)

Recross-Examination

By Mr. Miller:

Q. He was also treasurer of the Seattle Hardware Company?

A. Treasurer of both the Occident Trust Company and the Seattle Hardware Company.

Q. And these receipts also covered Lots 1 and 2 here?

A. Yes.

Q. Do you know where the money was procured from which the taxes were paid? Was that money of the Seattle Hardware Company?

A. I haven't any idea.

Mr. Miller: That is all.

Mr. Jones: I think that is all.

(Witness excused.)

/s/ ROY P. BALLARD.

Notarial Certificate [31]

State of Washington,
County of King—ss.

I hereby certify that on the 4th day of May, 1948, at 9:30 a.m., at Doctors Hospital, Seattle, Washington, before me, Bruce Moburg, Notary Public in and for the State of Washington, personally appeared the witness, Roy P. Ballard, on behalf of Plaintiff;

That H.B. Jones, Esq., and A. R. Kehoe, Esq., were present and interrogated said witness on behalf of Plaintiff;

That Homer R. Miller, Esq., was present and interrogated said witness on behalf of Defendant;

That said witness was by me duly sworn and put on oath to testify the truth, the whole truth and nothing but the truth, whereupon said witness, upon examination, under oath, deposed and said as in the foregoing, annexed deposition;

I further certify that the testimony of said witness was taken stenographically by men and that the said deposition thereafter was transcribed under my direction;

I further certify that after the testimony of said witness had been fully transcribed, the said deposition [32] was submitted to said witness for examination and was read to him or by him, and that any changes in form or substance which the witness desired to make were entered upon the deposition by me, with a statement of the reasons given by the witness for making them, and that the deposition was thereupon signed by said witness;

I further certify that the said deposition is a true record of the testimony given by said witness.

I further certify that all objections which may have been made at the time of said examination to my qualifications or to the manner of taking said deposition, or the evidence presented, or to the conduct of any party, and all other objections to said proceeding, have been noted by me upon said deposition;

I further certify that I am not a relative or

employee or attorney or counsel of any of the parties to said action, or a relative or employee of any such attorney or counsel, and that I am not financially interested in said action or the outcome thereof.

I further certify that I am herewith securely sealing said deposition in an envelope endorsed with the title of the above cause, and marked, "Deposition of Roy P. Ballard," and promptly sending it to the Clerk of the United States District Court at Tacoma, Washington. [33]

In witness whereof, I have hereunto set my hand and affixed my official seal at Seattle, Washington, this 5 day of May, 1948.

[Seal] /s/ BRUCE MOBURG,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed May 5, 1948. [34]

In the District Court of the United States for the
Western District of Washington, Southern
Division.

No. 1059

SEATTLE HARDWARE COMPANY,
Plaintiff,
vs.

CLARK SQUIRE, Collector of Internal Revenue,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Be it remembered that on the 4th day of May, 1948, at the hour of 2:00 o'clock P.M., the above entitled and numbered cause came on for trial before the Honorable Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States at Tacoma, Pierce County, Washington; the Plaintiff appearing by Messrs. Jones & Bronson (by Messrs. Harry B. Jones and A. R. Kehoe), and the Defendant appearing by Homer R. Miller, Special Assistant Attorney General and Thomas R. Winter, Special Assistant to Chief Counsel.

Whereupon the following proceedings were had and done, to-wit: [2*]

Mr. Winter: If the Court please, may I introduce to the Court, Judge Leavy, Mr. Homer R. Miller, Special Assistant to the Attorney General

* Page numbering appearing at foot of page of original Reporter's Transcript.

of the United States, and I move his admission for the purposes of this trial.

The Court: He may be admitted.

Is the Plaintiff ready to proceed?

Mr. Jones: First of all, Your Honor, I want to express our appreciation of your readjusting the calendar. We had a very unfortunate situation develop. Mr. Ballard, who is quite an elderly man, who was to be a witness in the case, had a bad fall Friday, and it developed over the week-end that it was a fracture of the pelvis or something of that kind. They've got him all strapped up on a board on the bed. And it wasn't hardly possible to take his deposition yesterday without crowding the thing, so we have done that today and it is being transcribed and will be available, I think, tomorrow.

The nature of this case is such that I imagine that Your Honor will want to take the case on briefs anyhow; I know Mr. Miller would [3] like to have it submitted in that way, and I—I really believe, from the study that I have made of it, that it's the only way that the case can be properly taken, because it's one of these rather technical tax cases that has to be considered in the light of special statutes and decisions.

And we will have that deposition certainly the day after tomorrow, possibly tomorrow.

The Court: I have gone through the pleadings here, and the allegations made in paragraphs one, two, three and four, are admitted, and the admission of paragraph four takes out of the case very

largely the issue of determining figures, because the amount involved here——

Mr. Jones: Well, yes, we have—we have been working on this case; while Your Honor hasn't had any pretrial conference, we've gone right ahead with a pretrial conference between ourselves; we've worked out a stipulation that Mr. Miller had written and will submit now, and also a pretrial order which will—I don't know whether it will clarify the thing very much, but at any rate, it will reduce it down to a very definite basis. [4]

The Court: I will be glad to have it, because there is here a denial in paragraph five and six, and doubtless there are some facts alleged there that are not in dispute.

Mr. Miller: We will tender a brief pretrial order, Your Honor. It has been approved by both plaintiff and defendant; and also a stipulation covering some of the facts in the case, which we would like to have filed and made part of the record.

The Court: I'm going to sign this pretrial order as submitted, and it will be filed and the case will be tried upon the issues as made therein.

Now, let me ask first—I'm going to give you both an opportunity to make some statements so that I can more fully familiarize myself with this controversy—but it appears from the original pleadings that I have read and now, likewise, from the pretrial order, that it hinges substantially around the situation in reference to the property acquired

by a subsidiary corporation some thirty, forty years ago, and the values that were placed upon it.

Mr. Jones: We have stipulated [5] on the value. That was one issue that—that threatened to take a good deal of time, was the question of valuation of the real estate and the building at the time of transfer to the plaintiff company; but we spent some time in going over that and sat down and talked it out, and we have agreed on that value, the values of both the land and the building, as of the time of the transfer.

The Court: And then is there another issue of fact here as to the—where the true ownership of the property rests?

Mr. Jones: I don't think that there is any issue as to where the legal title rested, but as I understand defendant's position, which has been made clear in the—in the statement of contentions, it is contended that that is not a real ownership on the part of the Occident Trust Company, but simply a sham or fictitious ownership; and that, I assume, is a question of fact that will have to be decided.

Mr. Miller: I think we can make our position clear on that in our opening statement, a little later on. That is one of our contentions that we make in substance.[6]

The Court: Very well, I'll be glad to hear from you.

Mr. Jones: I have prepared, or Mr. Kehoe had, a trial brief, but I think it might be confusing to file it at this time because when we prepared it we

prepared it before Mr. Miller was here, and simply on the pleadings as they existed, without statement of contentions and before the matter of valuation was determined; and unless Your Honor wants to take this with those limitations and knowing that it really isn't appropriate, I—I will not file it because I think that we can simplify the matter much more if we can defer the filing of our brief until the case is submitted.

The Court: I'll permit you to do that.

Mr. Jones: I think it would be more satisfactory.

Now, this case involves a claim for refund of the plaintiff, to income and excess profits taxes alleged to have been overpaid for the fiscal years ending November 30th, 1941, -2, -3, -4 and -5. The claim has not been allotted; it has not been denied officially, but more than [7] six months expired, so a suit was started and it is admitted by the defendant that claims as attached to the petition, or complaint, were filed and have not been acted on.

The issue for the year ending November 30th, 1942, is to be removed from the case by reason of the statute of limitations. The **Supreme Court** recently decided that the four year statute is not applicable, and in view of that decision, the claim for refund was not filed within the statutory time as to that particular year. It does not involve a very large amount; but whatever it is, it's out of the case. The—that has no effect. That was just one of four or five years which involved the same

situation; it has no effect except in the determination of the amount.

Now, we have also agreed that while this case presents quite a number of—of problems set up in the form of figures, that really that I think there is nothing for Your Honor to decide that involves mathematics or computations at this stage. The problem is one of principle as to what is the basis to this plaintiff for the property that's involved here, [8] and if Your Honor decides that the plaintiff is right, but the basis is the value at the time it was conveyed to it in 1906, then the matter of the application of that basis is simply a matter of computation and we have agreed in our stipulation that that question is reserved for future disposal, that is, the parties will submit—they'll agree on the computations amongst themselves.

Now the case, as I say, involves both income and excess profits tax liability. The income tax liability is involved only for the year 1945, because in that year the plaintiff sold this lot—these lots and this building that are involved here; but for the other years, the question also—the question that's involved, as well as for 1945, concerns the excess profits credit, and the computation of the excess profits tax, and that in turn depends upon the determination of the principle to be applied to what is known technically in tax law as the basis for this property.

Now the facts in the situation, I think I might outline very briefly, as they will be presented to

you, are these: Seattle [9] Hardware Company is a concern, as the name implies, engaged in the wholesale hardware business in Seattle since 1885.

In 1901 Mr. Ira Bronson, who was then attorney for the Seattle Hardware Company, formed a corporation known as the Occident Trust Company. The other incorporators were two parties not directly connected with the Seattle Hardware Company, Mr. Dana Brown and a Mr. Lawrence Moore. Capitalization of that company was a hundred thousand dollars. The record shows that at the same time, or approximately the same time as the company was formed, Mr. Bronson acquired for a stated consideration of sixty thousand dollars, the Lots One and Two of Block 327 of Seattle Tide-lands, that are in controversy here.

Immediately—and at the first meeting of the Occident Trust Company, the organization meeting, turned those lots into the company at a fair value of a hundred thousand dollars in payment for all of its capital stock. It would appear that in acquiring the lots he had acquired them for sixty thousand dollars. That's the consideration recited in the deed to him; but he turned them in to the Occident Trust [10] Company for a hundred thousand dollars of capital stock.

Immediately, the three organizers, Mr. Bronson and these other two parties, Dana Brown and Lawrence Moore, resigned; and in their place, as trustees, there were elected Mr. Ballard, the father of the witness I mentioned, Mr. C. H. Black and Mr.

F. W. Baker, who were the three leading and principal executives of the Seattle Hardware Company.

The evidence will further show that the Seattle Hardware Company contemplated that this Occident Trust Company would hold the title to these lots and would cause a building to be erected on them, suitable for the tenancy of the Seattle Hardware Company, and that at some time after that was done they probably would dispose of the Occident Trust Company and take over the property themselves, but that they desired, for reasons of their financial status and their balance sheet appearance and relations with their bank and so forth, not to encumber the Seattle Hardware Company with a real estate corporation, to keep that out of the hardware company and conduct it as a separate corporation. [11]

The deed to Mr. Bronson was not recorded for some time. I don't know but the record would show the date when it was recorded. The property, Lots 1 and 2, at that time was just part of the tidelands of Seattle. That was just before the big real estate boom, or the railroad boom in that area; and at the time they acquired it, the property was occupied by some more or less dilapidated buildings, they produced some rental and they incurred a good deal of expense.

The transactions, or the financial transactions of the Occident Trust Company with relation to the management of the property, the collection of the rents and the payment of expenses, are all recorded

in an account on the books of the Seattle Hardware Company entitled "Occident Investment" or "Occident Trust Company," they used the term "investment" at times, but it was at all times this one account of this company, this Occident Trust Company; and they record the receipt of the rents and the payment of repairs and that sort of thing.

Along in 1904 a building was [12] commenced, the Seattle—the present Seattle Hardware Company building, which is a seven story and basement building, and is still used by them.

The contracts for this building, we—we will have a large number of bills and vouchers and bonds, guaranty bonds and so forth, performance bonds, to show that they were all handled in the name of the Occident Trust Company. The building was built in the name of the Occident Trust Company, and in the course of its building and for the financing of it, the Occident Trust Company borrowed a hundred and fifty thousand dollars and gave a note and mortgage on this property to secure the construction loan. The note was signed also by the Seattle Hardware Company, and it possibly was signed or endorsed by some of the individual stockholders.

The testimony says that some of the stockholders did endorse the note. We have been unable to locate the original note. We did have it some time ago and its been misplaced; we haven't yet been able to relocate it. [13]

Now we have—strike that.

The question of who put up the money to acquire

these lots, or of just how the purchase price or the acquisition of them was handled, is obscure and frankly none of us can figure out just how that transpired. We don't think it makes any difference in this case, but we are unable to tell whether Mr. Bronson put up the sixty thousand dollars himself or whether some of the stockholders of the Seattle Hardware Company advanced it to him, or whether he obtained a loan from a bank, or whether he bought the property on deferred payments; but be that as it may, the property came into the hands of the Occident Trust Comany in satisfaction of its capital stock; and at a stage in 1904, as I recall the date——

The Court: Then Mr. Bronson received all of the capital stock of the corporation?

Mr. Jones: Yes, Your Honor. Yes, Your Honor. Apparently he received—it—it was paid in in exchange for all of the capital stock of the corporation.

Along in 1904 the property—the [14] books of the Seattle Hardware Company, in their account with the Occident Trust Company, reflect a valuation on the stock of the Occident Trust Company of a hundred and twenty thousand dollars, which is apparently the original sixty thousand dollars of the cost of the property, plus a sixty-thousand-dollar figure of appreciation.

Again in 1906,—at the critical date here, or just within a few days of it, appears a further entry on the books of the Seattle Hardware Company,

which in contemplation of the liquidation of the—or transfer of the property from the Occident Trust Company to it, recites that the value of the property has increased to two hundred and twenty-five thousand dollars, and they issued against that another hundred thousand dollars of capital stock of the Seattle Hardware Company, treating it then as if they had received from the Occident Trust Company the title to this building and issuing to their own stockholders a hundred thousand dollars more of stock for appreciation. That got the property up to two hundred and twenty thousand on their books. They referred to it as two hundred and twenty-five thousand, and that apparently was either an error [15] in making that reference or an error on their part in not issuing stock up to that point.

Now that—that value was a bona fide value as is evidenced by the fact that the Government has stipulated with us here that the value as of that date was two hundred and twenty-four thousand some hundreds of dollars.

Now at that time, February of 1906, the building had been finished, or practically finished. There were some odds and ends of unperformed commitments that hadn't been entirely disposed of, but substantially it had been finished and the Seattle Hardware Company occupied the building about that time.

The building showed on this Occident Investment Company account, or Occident Trust Company

account, a cost of two hundred and forty-four thousand dollars. Due to various circumstances that I don't need to go into, that cost did not reflect the true value of the building, and the Government has stipulated with us in the case that the true value of the building was approximately two hundred and seventy thousand dollars; so that that, together with the value of the land, made a total value on land and building [16] of around two hundred and—of four hundred and ninety-five thousand dollars.

On February 20th, I think it was, it may have been the 19th, I think it was the 20th, of 1906, the records of the Seattle Hardware Company show that a meeting was held at which time it was recited that it was decided to transfer the assets of the Occident Trust Company over to the Seattle Hardware Company; and thereupon at that time a deed was given, transferring the land and the building to the Seattle Hardware Company. The Occident Trust Company from that time on did no more business, except possibly to the extent of—of still acting as—as the contracting party on some of these accounts which had not been settled; some of the building accounts in the construction of the building that had been performed but were in dispute, still had to be ironed out; but the Occident Trust Company did not engage in any business after that time, it had no other assets than those that it transferred to the Seattle Hardware Company, it paid no further license fees to the state, and in

course of time, under the practice and the law in 1909 it was stricken by [17] the Secretary of State for failure to pay its fees.

Now our position is that under the tax law, and I'll refer to this again in detail a little bit later, that we are entitled to take the fair market value of the land and building at the time of the transfer to the Seattle Hardware Company, as basis. The plaintiff company, in its returns for excess profits tax purposes, in 1940 I think it was, had—I may—I may be in error in this—it's not material to the case, except to give Your Honor the background of the way this case comes up, and I think I am stating it correctly.

They had made their return for excess profits tax purposes, on the basis of being entitled to invested capital of two hundred and twenty thousand dollars, because of that figure for the real estate that appeared on the books. They had allowed the building, I think, to stand at the two hundred and forty-four, less adjustments that had to be made for depreciation.

The agent's office, on audit, disallowed the invested capital item or credit as claimed of two hundred and twenty thousand dollars [18] and reduced it to sixty, and said in effect that because the property only cost the Occident Trust Company which it, the agent said, "Well that in effect is the same as Seattle Hardware Company, and so we just disregarded the Occident Trust Company and we regard the cost of that as sixty thousand dollars instead of two hundred and twenty."

Now having made that ruling, and as I think—I think it was for 1940, the plaintiff by reason of that, then made its return for '41 and subsequent years, on that basis. I mention that simply to show that this present suit is not an afterthought that didn't come up until after all of these things were over, but that the plaintiff originally claimed substantially the basis as it now claims, but because of the agent's refusal to recognize that basis for invested capital purposes, it then made its returns for the years that are involved in this suit on the basis of the sixty thousand dollars credit instead of the two twenty, and then filed these claims for refund; asking invested capital credit on the larger basis of two hundred and twenty thousand.

Now in 1945, the plaintiff sold the land and the buildings. There—there had been [19] in 1918 a purchase of an adjoining lot and another small building put on that, so that from the figure standpoint the transaction in 1945 included an additional lot and an additional building.

Well, along with it, it sold the original lots 1 and 2 and the building that I've been talking about; and the sale price was less than the basis adjusted for depreciation, and the plaintiff claims in addition to the invested capital adjustment for 1945, it claims also a loss based on that difference in—between the basis and the selling price.

Now, if I may just go into the technical side of it a little bit, we will cover this, of course, on the briefs, but I think it might help if I explained a

little bit more of what we're getting at in this basis.

The Court: Let me ask you there, what consideration you stated, did the Seattle Hardware pay for—paid to the Occidental Trust Company, was a certain amount.

Mr. Jones: No, the——

The Court: Was it actual consideration——

Mr. Jones: No. That was one of [20] the things that I was going to go into, and I'll answer that right now and then probably touch on it again.

The consideration that the—the Seattle Hardware owned all of the stock of the Occident Trust Company. It—it acquired all of that stock, presumably by transfer from Mr. Bronson. It shows up on its books as the owners of all that stock; and in liquidation, under the statute and the decisions, the liquidation of a corporation is an exchange of its assets for—with its stockholders for the stock which they hold, and the stock which they hold being extinguished by the liquidation, or being rendered valueless by the transfer of all of the assets of the corporation, is regarded as a thing that is given in exchange for the assets; and in a case of this kind where there is no free market for the stock, so that you can't have a market value for the stock of the Occident Trust Company, both the statute, as applicable to 1913 valuations, and the decisions as applicable to all situations, recognize that that stock is to be valued by finding the value of the assets of the corporation which—whose

assets are transferred in exchange for the [21] stock. In other words, the stock represents the assets and the assets represent the stock, and if you can't—if you haven't any dealings in the stock so as to determine its value, you determine the value of the assets.

Well here, we have determined the value of the assets by a stipulation, so that they represent the value of the stock; and when the Seattle Hardware Company received the assets it either gave up its stock—the evidence will show that we can't find the stock certificates, we don't know just physically where they are—but when they took over all the assets of the company, of course they extinguished any value in the stock which they represented, so they in effect gave up the stock, which was of the same value as the assets. So that is the consideration that they paid.

Now that is really the point of the case. Your Honor has put your finger right on the real point of this case. I—I'm not going to try to go into the statutory provisions and distinguish them, because fundamentally they—most of them relate to transactions, of course, after February 28, 1913, when the law became [22] effective; but still we do have certain statutory concepts that deal with exchanges and bases prior to 1913.

Now, Section 111 of the Internal Revenue Code, says that for the purpose of determining loss, that is the loss by the Seattle Hardware Company of—on its sale in 1945—

The Court: How do you cite that in U.S.C.A.?

Mr. Jones: The Section a hundred and—in—well, I can't tell you in U.S.C.A., but we will put U.S.C.A. citations in our brief.

The Court: I was just wondering how that——

Mr. Jones: Yes, all right, we will do that.

The Court: I'm none too familiar with the Internal Revenue Code.

Mr. Jones: Well, that—that is now a basic code which carries through from year to year, so that you don't have to deal with the Revenue Act of '42 or '48, or whatever the year happens to be.

Section 111 says that for—that the loss on the disposition of the property shall [23] be the excess of the adjusted basis provided in Section 113b, for determining loss over the amount realized.

Now, 113b says this, that the adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired—and that relates to both before and after 1913—shall be the basis determined under subsection (a) adjusted as hereinafter provided.

Now the adjustments are for depreciation and additions and so forth, and those are not in controversy. We will agree on those.

And subsection (a), which I have just referred to in 113b, says that the basis unadjusted shall be the cost of such property with certain exceptions. There follow certain exceptions, twenty-two exceptions, but none of those exceptions, in our opinion, is applicable to the situation here. Now I don't think Mr. Miller will agree with that a hundred per cent. I

think he is going to take the position that one or possibly two of those exceptions, is applicable. We think that they are not applicable [24] exceptions and we will present the reasons why; but our position is that the basis in this case is cost, that cost is the value of the stock of the Occident Trust Company, which Seattle Hardware Company lost when it took over the assets of Occident Trust Company, and that the value of the stock under the decisions and the statutory provisions is determined by the value of the assets, so that the hundred per cent of the stock is measured by the stipulated value that we have here; and that that then has two effects, that it establishes a cost for this property, the land and the buildings, of four hundred and ninety-four thousand dollars in 1906, and that after making adjustments for the depreciation which the building sustains after that time, under the statute and on which there is no dispute, that we then arrive at a figure which is substantially in excess of the amount it realized on the sale of the property and it's therefore entitled to the difference between those two, as loss.

We further take the position that by that transaction the Seattle Hardware Company realized a gain equal to the difference between its dollar cost of the stock of the Occident Trust [25] Company and the value of the assets which it received from the Occident Trust Company, and that that becomes a part of its earned surplus, and is therefore to be considered in the determination of invested capital.

Now those are technical—this—this whole concept of both basis for gain or loss, and invested capital, is a very technical one. It must be determined strictly with reference to the statutory provisions and interpretations placed on those in the cases; and I think it would not particularly help Your Honor for me to try to—to argue those more in detail now; but what we contend for here is a finding by the Court that this subsidiary company was liquidated, or the property taken over—I don't care whether you say it's liquidation or—or just a transfer by way of a dividend, it comes to the same thing either way, but we speak of it as a liquidation because the company, Occident Trust Company, didn't do anything more after that—and that the value of the properties received by the sole stockholder, being a distribution of the entire assets of the subsidiary company, must be taken as a realized completed transaction at that time and governs [26] for excess profits and gain or loss purposes.

Now, in the presentation of this matter there are two problems: one is the income problem, and the other is the excess profits.

I have undertaken to cover, myself, the—the valuation problem and the income angle of it. The valuation we have disposed of, so I have only the income left.

Mr. Kehoe has given most of the time on our part, to the excess profits angle, and I would appreciate it if, to the extent that I don't cover anything, he may be permitted to present that to Your Honor,

either on examination of the witnesses or citation of our position. I don't think that there'll be many things that I won't cover; but if I don't do it, I would appreciate allowing him to do that.

Is there anything that you want to add to my statement, Mr. Kehoe?

Mr. Kehoe: Your Honor, there isn't anything to add. Our position is that—the basis for purposes of gain or loss controls in the invested capital issue, and if the Court holds that we're entitled to the basis for one [27] purpose, we get it for the other; and that will be covered rather thoroughly in the briefs, Your Honor.

Mr. Miller: As counsel has stated, this is a suit for refund for about two hundred thousand dollars, for the years '41 to '45, inclusive, fiscal years ended November 30th.

It is stipulated that there is no issue as to the year '42, because their claim is barred by the statute of limitations.

The Court: Well, isn't '41 also barred then?

Mr. Miller: No, '41 is not barred. '41, '43, '44 and '45 are open, but there—'42 was barred by reason of the fact that the claim—that the suit was not filed within the statutory period from the date that the claim for refund was filed.

The Court: But it was filed for '41?

Mr. Miller: Yes. Apparently the claim for '41 was filed later than the claim for '42, therefore '41 is still open.

Mr. Kehoe: Mr. Miller, if I might break in,

I can explain that. There was a [28] deficiency paid for 1941, Your Honor, at a much later date, and for that reason——

The Court: Oh, I see.

Mr. Miller: That's right. I didn't remember that.

Now, in brief, I think we can sum up the contentions of the parties. The year 1945 involves a loss on the lots 1 and 2 in—we will refer to them as lots 1 and 2, they are lots 1 and 2 in Seattle Tidelands, and there was a loss on those lots and the buildings. It's just a question as to how much that loss amounted to; and that goes back to the question of the basis—of the proper basis for the loss, and the building built thereon.

If, as the Government contends in this case, the Seattle Hardware Company in substance and within the authorities, and as a matter recognizable by the courts in determining tax matters, acquired these lots back in April, 1901, then the Government would be entitled to recover in this case, because they had been allowed the cost of the lots in that and the cost of the construction of the building and actual outlay and the actual money which the Seattle Hardware [29] Company put out for the lots and building, the construction of the building, have already been allowed.

If, on the other hand, it should be held that the Occident Trust Company was the party that acquired the lots back in 1901, then we have some different problems, and a number of problems that will have

to be settled; and I think the sustaining of the Government's contention on any one of these problems would resolve the case in the Government's favor.

And the same thing is true—the same question runs through the case with reference to invested capital, except that there are some other questions relating to the invested capital credit, which we have a couple of other contentions which we will raise that are not present in determining the loss on the land and buildings.

Now the principle—one of the main contentions in this case, relating to the land and building, is whether in substance and fact, the property was acquired by the Occident Investment Company, or whether the Occident [30] Investment Company was just an instrumentality, agency or nominee without any purpose or duties except the holding of title to property, and whether in fact and in truth, the Seattle Hardware Company purchased the lots itself, kept the title in the subsidiary as a convenient agency or instrumentality with the view to have it turned back to the Seattle Hardware Company just as soon as the building was completed.

I might say to Your Honor in the beginning, that this morning the plaintiff took the deposition of Mr. Ballard, who is now secretary of the company, the Seattle Hardware Company. He is an interested witness in this case, financially. He's a stockholder. He was a young man at the time that these transactions occurred, and was reasonably familiar with all of those transactions. He was a very fair

and in my opinion a very honest witness. I think his testimony was such that it can be accepted, as far as maybe making allowances for some things that he himself states that he did not entirely remember, but I think he honestly and fairly tried to tell the truth about it as he remembered it. [31]

And I think that his testimony in this case will very well disclose the purpose of this subsidiary and the reason that it held the title to the property.

The Seattle Hardware Company was a wholesale hardware company that was—the business was expanding at this time, back in 1901. It didn't want to have real estate carried in its name, because it was a hardware company. It was not a company that was engaged in building real estate; so it created this subsidiary just as a holding company, to hold the real estate until the building was completed. Mr. Ballard so testified.

The property was acquired by Mr. Bronson, who was the attorney for the Seattle Hardware Company.

The Court: I assume he is probably the father of the present Mr. Bronson, or is it Mr. Bronson of your firm, Mr. Jones?

Mr. Jones: No, he was the father of Mr. Bronson who is in the firm, but who is no longer—Mister—the present Bronson died in 1909. Ira Bronson came to Seattle, I think, about 1889 and died in 1939. [32]

Mr. Miller: That was my understanding.

Mr. Jones: Yes.

Mr. Miller: Mr. Bronson—and one of the other reasons why I think that the, and Mr. Ballard so testified, this property was acquired from Post and Stetson Mill Company, and it was a pretty tough proposition in buying the lots from these holders at that time because they were—I don't know whether they were Scotch or not, but they were difficult to deal with. So, Mr. Bronson took the title to the property in his own name, and he held it in his name for two years and a half, after title was taken. It was not turned over to the Occident Company until October, 1903.

Now, there was a statement made in the—by counsel, that it couldn't be determined from examination of the books and records and available data as to whether Bronson paid for the property or whether Seattle did. I don't think Your Honor will have the slightest difficulty in determining that question. Bronson had no interest whatever in this property. He was merely a nominee, Ballard so testified, and the [33] books and records will disclose it, and I don't think there can be any serious contention that Bronson was the man that bought the property.

The Court: But that is one of the contentions here, is it not?

Mr. Miller: I don't think so. I don't—I don't think that they are going to contend——

Mr. Jones: I don't—I don't expect to introduce any evidence to show that Mr. Bronson bought it with his own funds. I don't think that anybody

can determine just how the money was supplied; but I don't expect to contend that he bought it with his own money.

The Court: But you would not be prepared to stipulate that the funds for the purchase of the property, initially in 1901, were funds of the Seattle Hardware Company?

Mr. Jones: I can't determine that fact. I don't know whether they were, or whether they were the funds that may have been supplied by private stockholders——

The Court: Well, I just asked you because it seems to me——

Mr. Jones. ——or they may have [34] been acquired from a mortgage. In my opinion, it's immaterial.

Mr. Miller: Well—the records—I might say the books and records of the company disclose a sixty-thousand-dollar item at this particular time, indicating that the Seattle Hardware Company expended the funds. I think we can trace that figure through and show that their books and records so show it.

Now that brings us down to October, 1903, and up to that time Bronson had held the property.

The Occident Company was organized in April, 1901, by Bronson and two other parties who were merely selected as incorporators to fulfill the statutory requirements, they were not connected as—directly—had no direct interest in it, as Mr. Ballard testified.

This property was acquired and the deed was taken by Bronson four days after Occident was incorporated, yet Bronson held the title during all this time himself.

Now the Occident Company never had any——

The Court: And that is the deed [35] that was not placed of record?

Mr. Miller: How is that?

The Court: Was the deed not placed of record in 1901?

Mr. Miller: The deed—the deed was placed of record in 1901, and it was placed of record in 1903; but in February, 1906, it was deeded by Occident over to Seattle. The evidence will show that the minutes of the trustees of Seattle stated that the deed was not to be recorded but was to be held by Seattle, for the present, and Mr. Ballard gave his explanation of that in his testimony; and that deed was not recorded until sometime in 1908; and the reason for it was that—that according to Mr. Ballard, that there might be claims come up concerning the erection of the building, claims against the contractors, and they wanted to hold the matter open till 1908 so that if any suits had to be brought they could be brought in the name of Occident, instead of in the name of Seattle.

Now, the evidence will show that Occident never kept any books, as far as we can show. All of the taxes on the property were paid by Seattle, while the property was held by Bronson, [36] Seattle's treasurer paid the taxes, took receipts in the name,

and then there was an account on Seattle's books on which Occident was charged or credited with these items, but Occident never kept any books itself. And as far as we can find out, and Mr. Ballard says he never saw any, there was never any stock issued, stock certificates issued. There certainly was never any turned in for cancellation on the—on this—under this so-called liquidation. There was never any dividends paid, the company was never held out to the public as being a corporation.

And Mr. Ballard testified that the reason for its incorporation and its sole duties was the duties of holding the title to this real estate. It had no other assets, no other functions.

Then along in 1904 they started the construction of a new building on the property, and the Seattle Hardware Company appointed the building committee, as its records showed. The building committee was—Mr. Ballard was one of them, they were authorized to call upon and employ an architect to construct the building. We do not have the contract that was made with the architect; [37] I don't know in whose name the contract was made, whether it was made in the name of Occident or Seattle.

The facts all the way through this case will show that while there was a corporate form here, and a legal incorporation we will assume, it had no other purpose except the holding of title to realty, temporarily, for and on behalf of Seattle; and we think that under the law, which we will amplify in our brief, which is authorities which I think pretty well

recognize the proposition. There are certainly a strong line of cases from the Second Circuit on that point, even running down here to one recently within the last two weeks—two or three weeks—that where a company has no other title or function, except a mere holding of the title of real estate, and is under the control and domination of some other company, the corporate entity is—may be disregarded for tax purposes and the—and the income from the property, and of course that isn't involved here, but the corporate entity may be disregarded generally, not only for tax purposes but for other purposes as well.

Now it's true that in this case [38] this—these transactions took place back in 1901 to 1906 when we didn't have any income tax law, and of course there was no motive of tax avoidance entering into the picture because there wasn't any tax; but there are still a line of authorities that in tax matters who prefer substance over form. You look at the transaction not—or the legal title is not determinative in these matters, but you can survey the entire picture and determine whether it is the truth in reality.

Occident paid out its money for this property.

Now, it's, of course in this case, the parties, or a good many of the parties are dead. It happened a long time ago. I think, outside of Mr. Ballard, there isn't very many of them that were of the original parties that were—entered into this deal that are still here. There may be one or two——

The Court: There is no issue involved here as to the cost of the construction of the building on the lots, is there?

Mr. Miller: No. I was going to come to that. [39]

The Court: All right.

Mr. Miller: The building was constructed, and there is no question about the amount of the cost of it. We have stipulated on the amount of the cost. The building was finished along in the early part of 1906. They moved in on—in April, 1906. The building was deeded over in February, 1906, just about the time that it was made ready for occupation.

This building was—the cost of it has been stipulated about two hundred and some—two hundred and seventy—no, the cost of it would be two hundred and forty-four thousand dollars, under the Government's contention; that was the actual adjusted cost for the building. However, if—if the taxpayer is correct here in his position, and if that its cost was the value of the building in February, 1906, then we stipulated that the fair market value of the building in Febru—on February 21, 1906, was some two hundred and seventy thousand dollars. However, the stipulation expressly provides that the defendant does not admit that that sum of two hundred and seventy thousand dollars was the fair market value of the building on any other date except [40] February 21, 1906. I told counsel that we—our intention in putting that reservation in was not to be technical, but if the liquidation took

place on February 20th, 1906, or some date within a day or two, of course our—we would admit that the value was the same on those two days; but if the crucial date is some date removed, within a distance of even as much as a month or more, we would not admit that that was the fair market value of the property, because the property values, according to the testimony and the evidence here, the differences in value over a period of years were fluctuating greatly during this period of time.

Now, there is a number of technical questions in this case that have to be considered. Of course it's true that in determining losses, Congress has provided that the basis is the cost of the property, even though it was acquired prior to March 1st, 1913. That isn't true as to gains, but determining losses it's—it's a cost regard—even if it is purchased back in 1890 or some earlier date.

Now, it's true also that under Section 115(c) of the Internal Revenue Code, that [41] generally where a liquidation takes place and there is a distribution of the property by a corporation to its stockholders in exchange for stock, that's treated as a sale of stock, and gain and loss is recognizable on that transaction.

There are some exceptions in the act which we want to discuss. There's a Section 113(a)15 of the Revenue Code, providing that if the property is received by a corporation upon a distribution in complete liquidation of another, within the meaning of Section 112(b)6, then the basis shall be the

same as it would be in the hands of the transferor. Of course, that puts us back into Section 112(b)6 to see what that means.

112(b)6 was enacted in 1934, but the authorities hold that these bases statutes, in determining bases you go to the Revenue Act in the year involved, not in the year of the bases. In other words, if you've got a transaction, a sale that took place in 1928, which defines bases, you go to the 1928 act to determine the proper basis to be applied.

Now the only difficulty with this proposition is that here you are going back, back [42] beyond the March 1st, 1913. The act is not entirely clear, and I want to discuss it and study it further and treat it in my brief; but we think it's reasonably plain that 112(b)6, which provides that no gain or loss shall be recognized upon the receipt by a corporation of property distributed in complete liquidation of another corporation, refers to the basis of that property, of course, and it goes back—it goes back just as far as necessary in order to determine the question.

Then there's a similar statute as Section 113(a)11, and it provides that where a property is acquired by a corporation during a period of affiliation, the basis shall be determined without regard to inter-company transactions in respect to which gain or loss was not recognized. Now the only question there is the meaning of that word "affiliation." Does that word have some definite meaning connected with tax matters, or is the word "affiliation"

a word that could be applied to two corporations where one of them owned all the stock of the other, even back before the days of the enactment of the Sixteenth Amendment? That's the question involved there. Now any one of those propositions, the application of either of the statutes would defeat the plaintiff on its theory of the case.

Then there's a further question in this case as to whether or not the Occident liquidated in 1906. If it delivered a deed to Seattle, and the trustees of Seattle passed a resolution stating that that deed would be held for the present, and not recorded, a situation was presented whereby that deed could have been turned back without any difficulty; and if the stock was not canceled under the liquidation, there are authorities holding that that is not a liquidation within the meaning of Section 115(c).

As a matter of fact, this corporation stayed in existence until 1909, when it was—it's existence was terminated because it didn't pay its corporate fees to the State of Washington. It could have been revived, it is assumed, at any time before that and continued to be operated as a corporation.

Now if that's true, that the liquidation didn't occur until 1909, then we have—then we have the question of value, and I think the plaintiff would not be entitled to [44] recover for failure of proof, because I don't think they are going to be in any position to show that—we understand the market dropped again between 1906 and 1909, we don't think

they are going to be in any position to show that the values that have been assigned here, or that they can show, that is, the cost that has been attributed by the Commissioner is out of line in this case.

The—there are many questions entering into this case from the standpoint of the—a good disregard, or of the corporate entity.

I might say, also, we have—there's a somewhat serious question here in our mind whether they—under the circumstances, as outlined in this case, and as the evidence will show, whether they did acquire this property under such circumstances as they could—as to make it includable in the invested capital at any figure higher than the basis of the transferor; but I want to go into that further, also, in my brief.

Now the general principles under which this corporate entity here should be disregarded is, first, the old legal principle that substance rather than form governs in tax matters, and that the legal title alone is not the [45] determining factor, but taxation is more concerned with the actual benefit for which the tax is paid than it is with the refinements of legal title.

Then there is a further question that if—if you—if a transaction is carried out by several steps, that is, you deeded property to a certain person and then that property is later deeded to somebody else, and then deeded to somebody else—it all is a part of one plan, you cannot break up those steps—

or, you cannot separate those—that transaction into separate parts for tax matters, but that is all treated as one transaction.

Then there's a—then there's a general rule that is applied not only in tax matters, but in all matters dealing with corporations, of where ownership of stock is resorted to not for the purpose of participating in the affairs of the corporation in a manner normal and usual to the stockholders, but merely to make it an agent or instrumentality or a department of another company. The courts will look through the forms to the realities of the situation between the companies, and will deal with them [46] as the justice of the case may require. The Supreme Court has spoken on that on—on several cases. And these rules are not applicable merely to matters involving taxes, but they're applicable generally and they're—we—we are going to cite to you very many cases where the corporate form has been disregarded and in cases like this, which we think is an extreme case, under the evidence, where they will look beyond the corporate entity and merely treat the—the subsidiary as the—as the agent or instrumentality of the corporation.

We've got some cases here almost like this, we think, in their facts, where that—where that had been done.

And of course this case will depend upon the evidence, like all cases, and the evidence, we believe, though, will generally support the propositions that I have just outlined.

There is one other thing I wanted to mention to you, that I don't know that we've stipulated on it. There has—there has been a jeopardy assessment imposed by the Commissioner for the years '43 and '45, an additional assessment and an over-assessment of—well, it results in a net overassessment. [47]

Now we have stipulated that that—that any questions relating to those over-assessments will not be litigated in this proceeding, but that this proceeding will not constitute *res judicata* as to any questions that might come up with reference to those—to those matters at a later date, and that each side has expressly waived any right to rely on the decision in this case as being *res judicata* in those matters.

The Court: Your stipulation will be respected in that regard.

Mr. Jones: I think it might help a little bit if I'd refer to just two or three things here very briefly.

The matter that Mr. Miller referred to, of the fact that the conveyance from Occident Trust Company to the Seattle Hardware Company was not recorded for some time after it was given. In my opinion it is absolutely immaterial. The recording of a deed, of course, is no part of the conveyance. It has nothing to do with the validity of the conveyance, except as affects third parties who might otherwise be prejudiced for some reason; but as between the [48] parties, the recording in itself, means noth-

ing, and the transaction is just as complete a transaction upon the delivery of the deed, whether it's recorded or not. Now——

The Court: Well, isn't that dependent upon whether the delivery is an irrevocable delivery, or whether it's a delivery of condition?

Mr. Jones: Well, if it's a conditional delivery, yes, I think so; but if the—if the deed on its face and the conveyance on its face is an absolute conveyance, then certainly it makes no difference whether it's recorded or not.

Suppose, for instance, that I came in as a purchaser of stock in the Seattle Hardware Company in 1907, say, after it had acquired this property but before it had gotten—put the deed on record. It would make no difference whether the deed was on record or not; I would be entitled, as a—as a stockholder of that company, to insist, that is, against Occident Trust Company, that I owned the property, regardless of the record.

Now, the points that counsel has made about the statutes, evidence some of the complications that I suggested, but while this is [49] fresh in Your Honor's mind, I would like to just call attention to our position on those particular points. Take, for instance, this reference in 113(b)15 to 112(b)6. Now 113—I guess that was (a)15, 113(a)15, property received by a corporation on complete liquidation of another. And it says that if it was so received within the meaning of Section 112(b)6, then the basis shall be the same as it would be in the

hands of the transferor. So you have to go back to 112(b)6, as Mr. Miller says; but when you get back there you find that 112(b)6 says that for the purpose of this subpara—of this paragraph, a distribution shall be considered to be in complete liquidation only if (b) no distribution under the liquidation was made before the first day of the first taxable year of the corporation beginning after December 31st, 1935.

In other words, 112(b)6 has no application to a distribution made prior to the first of 1936.

Mr. Miller: There is another—there is another condition in that, I think, that will apply.

Mr. Jones: Not—not that I find. [50] I mean, it—it is very definite that—that a distribution in liquidation, within the meaning of 112(b)6, shall not be considered such unless—if there was a distribution made prior to 1936.

That just illustrates the exceptions and the answers to the exceptions that I said—referred to in my opening statement.

Then again, counsel refers to 113(a)11, which is transfers—bases on transfers between affiliated corporations. Well, now, in the first place that refers—it says that the basis shall be determined without regard to intercompany transactions in respect of which gain or loss was not recognized. Well now, that non-recognition of gain or loss comes into the tax law only through 112(b)6 and similar provisions, which were adopted for the first time, as I recall it, in 1918; so you have no non-recognizing provi-

sions of the statute back of that time; but in addition to that several courts have passed on this very contention that the Government makes, that a liquidation would be a transaction between affiliated corporations, a liquidation of a wholly owned subsidiary, and they have said "no," that this refers to transactions during the course of [51] affiliation, that liquidation breaks the affiliation and that this section does not apply in cases of liquidation.

Now those, of course, will be matters to argue in the brief, but I simply refer to them to show how nice the distinctions are, and how delicate the—the points are, and how careful we must be to follow the language of the statute.

Counsel said that the evidence would show that the Occident Trust Company is not held out as a corporation to the public. I—I think that that is not a maintainable statement because in the first place its articles were filed as a matter of public record; a conveyance to it was filed as a matter of public record, of this property; and as we shall show in the course of the trial, a great many contracts were entered into directly with the Occident Trust Company and bonds given to secure performance in the erection of this building, in the name of the Occident Trust Company.

Now just one other thing. Mr. Miller suggests that if Seattle Hardware Company itself had acquired these lots in 1901, then the Government would have to be sustained in this case. I—I entirely dis-

agree with that. [52] I think it would have been perfectly consistent and perfectly in accord with plaintiff's theory, if Seattle Hardware Company had either directly itself formed Occident Trust Company, or, it being formed, if it purchased all of the stock and furnished the money with which Occident Trust Company bought this property; or if it—if Seattle Hardware Company itself bought the property and then turned the property into the Occident Trust Company for the stock of the Occident Trust Company, which is what counsels thinks occurred here and I—I can't—I can't say it didn't occur. I—I can't vouch for the fact that it did; but assuming that it did, assuming that Seattle Hardware Company in substance, put up the money to buy the property, and then formed the Occident Trust Company for reasons connected with the good management of its own business, to keep it out of the Seattle Hardware Company, put it into a separate company to build the building, incur the credit risks and the financial or physical risks of construction during the period of construction; if it did that and then at the end of that period took the property back by a liquidation of the company, that in my mind is [53] entirely within the scope of the law and the cases supporting the right to the—take the basis as of the date of the distribution or liquidation or reconveyance.

Now the Commissioner himself has maintained that position time after time, where corporations have formed subsidiary companies for limited pur-

poses, sometimes much more limited than this, and then when they have—have accomplished the purpose and seek to change the situation, take the—and dissolve the subsidiary, and there's been a gain, they have been taxed on the theory that that is a consummated transaction resulting in recognition of gain or loss; but that is, as counsel says, is a matter that we will have to submit on the cases.

The Court: Well, it seems to the Court, on the basis of the opening statements that have been made, that we might be able to better try this case by piecemeal, which is an unusual procedure, but this is what I have in mind: the first issue to be determined in this case is whether, in fact, the Seattle Hardware Company acquired the property, either directly or indirectly, for their own use and benefit, and if [54] they acquired it in that manner, by using in one instance, Mr. Bronson as the grantee in the deed of conveyance but they actually paid the money, and that he was merely acting in the capacity of a trustee for the corporation, Seattle Hardware Company, and then this Occidental Trust Company was created again through the action of the Seattle Hardware Company for the purpose of taking title to the property and constructing thereon a building, and when that was done it was turned back, that appears to be the contention made by Mr. Miller's statement, and that I assume is disputed by the plaintiff herein.

But that issue should be determined, and if it's determined, and if it's determined adverse to the defendant in this case, then all of these other matters

will become material; if it's determined adverse to the plaintiff's contention, then it would virtually be determinative of the case, would it not?

Mr. Miller: I would like to suggest to Your Honor along that line, all the evidence can be put in at this hearing; but does the putting in of the evidence on the issue that you have just outlined, will cover the other issues also, I think. Now it is just a question of [55] whether Your Honor would care to have only that first issue covered by briefs and arguments and disposed of first. There would be no necessity, as I see it, to introduce any further evidence in the case, because the evidence covering that issue, together——

The Court: Well, if that's the situation, why, of course, I'd be a party to that; but I—I—as I see the matter now, that's an issue that I'm going to have to make a determination of—in. I don't want to—if it were determined adverse to the contentions now made by the plaintiff here, to burden counsel on both sides, and the Court likewise, on these highly technical issues of law that are raised on—by the citations of the Revenue Act.

Mr. Miller: I would like to make a suggestion. I don't like to—it is going to mean a lot of work to brief these technical questions. If you could dispose of that issue first——

Mr. Jones: Of course you can't——

The Court: Well, of course, you can't call upon the facts.

Mr. Jones: There—there are some of the tech-

nical aspects of it that are going [56] to find their way into the determination of that question, but I think that counsel's first suggestion that the evidence is very short—we will finish the evidence. I have one witness who should probably take fifteen or twenty minutes. I don't know if I'll have anything more except the documents as evidence, and I think we should go ahead and make our record, and then the submission of it. Of course for submission, we can take whatever course may seem proper, but naturally, whichever way the case goes, the record, I think, should be made of it.

The Court: Well, I'll permit you to do that, assuming from what you state to me, it's not going to lengthen the hearing.

Mr. Jones: Oh, no, it won't materially lengthen the case.

The Court: But then—and I shall keep an open mind on the primary issue here, and your brief should be addressed to that first, and I can make a determination of that issue, and on the outcome of such determination will arise the question of whether I want second briefs on the [57] other technical issues.

We'll take an intermission now of ten minutes.

(Recess.)

CHARLES S. WILLS

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Will you state your name?

A. Charles S. Wills.

Q. Where do you live, Mr. Wills?

A. Seattle.

Q. What is your business?

A. I'm the Executive Vice President of the Ernst Hardware Company.

Q. Are you a stockholder of Seattle Hardware Company? A. I am not.

Q. Or connected with the company in any way at the present time? [58]

A. None whatever.

Q. Do you have any interest whatsoever in the outcome of this litigation?

A. None whatever.

Q. Now were you ever connected with the Seattle Hardware Company? A. I was.

Q. During what period of time?

A. From April 29, 1904—rather, May the 1st, 1904, until July of 1930.

Q. And in what capacity?

A. As treasurer.

Q. Were you a trustee of the company also?

A. I was.

(Testimony of Charles S. Wills.)

Q. How did you happen to become connected with the Seattle Hardware Company?

A. Well, I was in the office of the President of the company, back in Detroit, Mr. Clarence Black, and I had just—I had given up the practice of law and came west to be the treasurer of the Seattle Hardware Company.

Q. And when you came, who were the chief executives of the Seattle Hardware Company?

A. Mr. A. S. Burwell, Mr. C. H. Black—Mr. C. A. Black, and Mr. Ballard. [59]

Q. What Mr. Ballard is that?

A. That's the father, M. D.

Q. M. D. Ballard, the father of R. C. Ballard—

A. That's correct.

Q. —who is now the secretary—

A. Now the secretary.

Q. —of the company?

A. That's correct.

Q. Those men you have mentioned, are they still living, any of them?

A. They have all passed away, excepting Mr. Ballard, that's Mr. R. C. Ballard.

Q. How closely were you associated with those executives after you became connected with the company?

A. Well, I was made a trustee of the company from 1905, assistant treasurer, and then treasurer, and remained in that capacity until I left the company.

(Testimony of Charles S. Wills.)

Q. Do you recall the Occident Trust Company, a corporation?

A. Yes, I recall we had a corporation by that name, Occident Trust Company.

Q. Do you recall whether there were any stock certificates issued by that company? [60]

A. I am quite sure there were.

Q. You have a—a recollection——

A. That's right.

Q. ——of seeing stock certificates.

A. Yes, I——

Q. Do you recall in whose name the stock certificates were, do you have any recollection on that?

A. Well, my recollection was that there were three qualifying trustees, and then one stockholder held the balance of the stock in the name of a trustee, in his name as trustee.

Q. And do you know who was regarded as the beneficial owner of that stock, from 1904 on?

Mr. Miller: By whom?

Q. Well, by your—by the Seattle Hardware Company, or the executives of that company.

A. Well, it would be by the executives and the Seattle Hardware Company. The Seattle Hardware Company, I should say.

Q. Was considered as the owner?

A. Yes, the beneficial owner.

Q. Do you know whether there was a stock ledger kept of Occident Trust Company stock?

A. I'm not certain as to that. We were very

(Testimony of Charles S. Wills.)

common-minded, and I think they probably kept that under [61] one name, and then there—under one account in the ledger, but I'm not certain on that score. I know we had a common bookkeeper for both the Occident Trust and the Seattle Hardware Company.

Q. Well, what I was talking about, Mr. Wills, I think is a little different than what you have in mind. I was talking about whether there was any ledger kept showing the ownership of the stock of the Occident Trust Company, if you recalled any such ledger, or separate stock ledger?

A. Well, I think it was just in the stock book. I'm not certain on it.

Q. Do you recall having seen the stock book, or can you recall having seen it since, say 1906 or 1907?

A. Well, I—I've seen the certificates, but I just can't recall what became of them, or when I last saw them.

Q. There is some reference in some of the books, to Occident Investment Company. Do you know whether there was ever any Occident Investment Company as a separate corporation?

A. I don't think there was. I think that was just an error. It should have been Occident Trust.

Q. Now, what did the assets of the Occident Trust Company consist of, beginning in 1904 and continuing as long as you were familiar with it?

A. The land and building.

(Testimony of Charles S. Wills.)

Q. Anything else?

A. Nothing that I know of.

Q. Do you know when, or what became of the land and building of the—that was held by the Occident Trust Company?

A. That was later transferred or sold to the Seattle Hardware Company.

Q. About when did that occur, do you remember?

A. Well, that was after the building was completed.

Q. Well——

A. And I should say somewhere from six months to a year after that.

Q. Well, to refresh your recollection, if—there appears to be a deed dated February 20th, 1906. Would that correspond about with your recollection?

A. Yes, I think that would be about the time.

Q. I might show you the deed. I——

A. Yes, that's my writing. I prepared the deed.

Q. That—that deed you prepared, did you?

A. I prepared that.

Mr. Jones: Will you mark that [63] as Plaintiff's 1?

Q. And do you know—do you recall now the occasion for the issuance of this deed, or the circumstances under which it was given?

A. Well, they had no further use for the Occident Trust Company. We had no plans for build-

(Testimony of Charles S. Wills.)

ing any more, and we just allowed the corporation to lapse.

Q. What had been the purpose or function of the Occident Trust Company?

A. To build this building on the land that they had acquired, and to make the contracts in the name of the Occident Trust Company, and do all those things that would avoid the responsibility or legal liability of the parent company.

Q. And what were the reasons why they—well, I guess you have stated the reasons why it was a separate company.

A. Well, there was one other reason. They had to borrow money and they didn't—

Mr. Miller: May I—

Mr. Jones: Yes, surely.

Mr. Miller: This witness was not there when the Occident Trust Company was formed, and I wonder if you would show what basis—

Mr. Jones: Well, of course, he [64] can only speak from the time that he became connected with it, or from such conversations as he may have had with his fellow executives.

Mr. Miller: It would have to be based on hearsay, because he was not there at the time that the company was formed. I think I will object to the question, unless you lay the basis for the testimony.

Mr. Jones: Well, I'm—I'm asking what the witness knows, and I submit that in any—

The Court: He may answer.

(Testimony of Charles S. Wills.)

The Witness: Is it all right?

Mr. Jones: Yes, you may answer.

A. One other reason was, they had—had to borrow money, and that was an obligation of the Occident Trust Company, and it relieved the Seattle Hardware Company from that much bills payable.

Q. Were you with the company at the time that that mortgage was given, do you recall?

A. Well, that I can't recall, but I do recall many times going to the Thomas Investment Company to make an installment of interest.

Q. This will be shown in evidence a little later, that under date of September 21st, 1905, the Occident [65] Trust Company issued a mortgage to Travelers' Insurance Company for a hundred and fifty thousand dollars. Were you with the Seattle——

A. I was.

Q. ——Hardware Company at that time?

A. I was.

Q. Is this one of the circumstances that you refer to, is it? A. Yes.

Q. Now, when the deed was given by Occident Trust to Seattle Hardware Company, there is a recital in the minutes to the effect that the deed should not be put of record for the time being. Do you recall that, or would you like to see the minutes?

A. Maybe my memory would be refreshed if I——

(Testimony of Charles S. Wills.)

Q. Yes, I'll show you the minutes.

I call your attention to page thirty of a minute book which we will have marked as Plaintiff's 2; I suggest you read that, and then I'll ask you something about it.

Mr. Jones: Now I think the whole book should be marked, don't you, Mr. Miller?

Mr. Miller: Yes.

Mr. Jones: And then we can refer to whatever parts we want to. [66]

The Clerk: Plaintiff's Exhibit 2 marked for identification.

A. I can't recall, but I know the reason for it.

Q. You don't know what the reason for it was?

A. I know my own reason at this time, in reading it over, and I think that was the reason at the time.

Q. Well, would you state——

A. The—there were some unsettled matters of the Occident Trust Company, involving the—in connection with the material that went into the building, and they thought it was apparently advisable to hold that up until that was all settled.

Q. That is, to hold up the recording of the deed.

A. Recording of the deed.

Q. Well, who—who took the deed at the time that it was executed? Whose possession then was it put into?

A. Well, I think C. H. Black. Now, I have——

Q. And he was what officer of the Seattle Hardware Company?

(Testimony of Charles S. Wills.)

A. He was one of the—I don't think he had a title, but he was the directing—managing director.

The Court: The managing director of which corporation? [67]

The Witness: Of the Seattle Hardware Company.

The Court: And he was secretary of the Occidental——

The Witness: He was secretary of the Occident Trust.

Q. Was there any suggestion or anything to the effect that the, as between the parties, the delivery of the deed should be delayed, the delivery of the deed itself, as between the parties, should be delayed?

A. No, I think not.

Q. Now, from the time of the delivery of that deed, did the Occident Trust Company carry on any business or engage in any business transactions?

A. Not to my knowledge.

Q. Well, would you have known if it had?

A. Well, I'm reasonably certain; I think the account was ruled off.

Q. And do you know whether it continued to pay any license fees to the state, after that time?

A. I don't know whether they paid that year or not, but I know that it wasn't paid for some years and then the Secretary of State just scratched it from the records. It was allowed to lapse. [68]

(Testimony of Charles S. Wills.)

Mr. Jones: That's all.

Cross-Examination

By Mr. Miller:

Q. Mr. Wills, you came into the company in May 1904.

A. Yes, I arrived in Seattle on April 29, 1904, and I think it was around the first of May.

Q. At that time had the building—had the building construction been started?

A. Yes, it had, they were driving the piles.

Q. Had the old buildings been torn down?

A. Oh, they must—yes, they must have.

Q. They were torn down.

A. Although, I didn't—I didn't—I never saw the old buildings.

Q. You don't know anything about how the old buildings were rented, that is, of your own knowledge, who collected the rents, do you?

A. No, I do not.

Q. You don't know who employed the architect to construct the new building, do you?

A. Well, the—I——

Q. Making the plans for the new building, we will take that up first. [69]

A. No, because that was ahead of my time.

Q. That was before your time.

A. But I know who the architect was.

Q. Now, I believe you testified that you saw some—some stock certificates that had been issued. Are you positive about that, or is that just——

(Testimony of Charles S. Wills.)

A. Well, I'm reasonably certain. I just—it's just from memory, it's been forty-four years.

Q. Of course, you—there were stock certificates issued by the Seattle Hardware Company for its stock, it had a stock book. Do you know how many certificates were issued by the—by the Occident Company?

A. Off-hand, I think there were four.

Q. And who were they issued to?

A. Well, this is from memory. I think there was one share in each of the three—three trustees, and one share for the—one certificate for the balance of the shares to a trustee.

Q. And who was that trustee?

A. Well, that—there was Mr. M. D. Ballard, Mr. F. W. Baker, Mr. C. H. Black, and Mr. A. S. Burwell, and which one was which, I don't know, but they were all—

Q. Were there any of these certificates issued to Mr. Bronson? Did you see any certificates issued to him?

A. Well, I think the original company was Mr. Bronson, and I think he subscribed to the original stock.

Q. Well, were the stock certificates issued in his name?

A. That I—I don't remember ever seeing those. those.

Q. As a matter of fact, the entire matter is rather hazy in your mind, isn't it? You're not

(Testimony of Charles S. Wills.)

certain as to just what—what those certificates showed.

A. Well, it's a matter of reasonable memory. I've happened to have seen the certificates.

Q. Now, after the deed was delivered, in February 1906, do you know what was done with those certificates?

A. No, I don't, no.

Q. Do you know whether they continued to remain in the stock book after that, or in the files of the Occident Trust Company?

A. The stock book—the stock book and the minute book were left in the hands of the secretary, Mister—I think it was Mr. C. H. Black.

Q. Well now, you know, don't you, Mr. Wills, that the minute book is—has been located and has been found, that there's been——

A. No, I didn't. I didn't know anything about it. [71] I didn't know whether it's been lost or found.

Q. And that there is no record of any—of any stock certificates, or any stock book.

A. I didn't know that.

Q. You testified, I believe, about the mortgage that was executed in October of 1905. That was a mortgage for about a hundred and fifty thousand dollars, wasn't it?

A. That's right.

Q. And that was a mortgage to raise funds for the construction of the new building, wasn't it?

(Testimony of Charles S. Wills.)

A. That's right.

Q. Who signed that mortgage? And note.

A. Well, the officers of the Occident Trust Company, and I think it was guaranteed by the Seattle Hardware Company.

Q. As a matter of fact, the Seattle Hardware Company signed both the note and mortgage along with Occident, didn't they?

A. Yes, in the nature of a guarantee. That was the nature of it.

Q. Well now, you testified that the purpose of forming Occident, if I understood you right, was that, so that Occident would not avoid—or, would avoid becoming obligated for the construction of this building.

A. You mean the Seattle Hardware Company.

Q. The Seattle Hardware, I mean, yes. Well they did sign this note and mortgage, which was placed on record along with Occident, didn't they?

A. Yes, but that was in the nature of a contingent liability rather than a direct.

Q. I see. Did—were there any other books kept except the minute book and the stock book, of Occident?

A. I couldn't say.

Q. You don't remember any others, do you?

A. No, I couldn't say.

Q. And as a matter of fact, the account showing expenditures that was made in the construction of this building was—were all carried on Seattle Hardware Company's books, weren't they?

(Testimony of Charles S. Wills.)

A. I think they were in a private ledger.

Q. And they had an account—an account that was originally made out to the Occident Investment Company, wasn't it?

A. Yes, I saw that.

Q. Carried in that name.

A. Well,—

Q. And there was no such a—such concern as the [73] Occident Investment Company, was there? That was—

A. I never heard of it. Never heard of it.

Q. And then the name was changed over later, to the Occident Trust Company.

A. That's right.

Q. Do you know when that was changed from the Occident Investment Company over to the Investment—Occident Trust Company? A b o u t when—was that after you came there?

A. Well, I—I don't recall it ever being the Occident Investment Company.

Q. I see. You haven't examined that account recently?

A. I saw it the other day, and Mr. Jones called my attention to it. It was all news to me.

Q. Well, as a matter of fact, the procedure was that whenever any payments were made on account of the construction of the building, they were paid out of the Seattle Hardware Company's funds, were they not?

A. The Seattle Hardware advanced funds for—

(Testimony of Charles S. Wills.)

Q. They advanced all the funds for the—and then they made a charge on this account to—or a credit on this account, to Occident, didn't they?

A. It was handled through—that was a credit.

Q. And that was all handled—it was all handled on Seattle Hardware Company's books.

A. I think so.

Q. There was no books of Occident.

A. Right.

Q. And they had no separate bookkeeper, separate and apart from the Seattle Hardware, did they?

A. No, the same bookkeeper.

Q. And they had the same officers, didn't they?

A. What was that?

Q. Did they have the same officers as Seattle?

A. No, they did not.

Q. Who was the treasurer of Occident?

A. Of the Occident Trust Company?

Q. Yes.

A. I think Mr. Baker. He was the treasurer of Seattle Hardware also.

Q. Well, did Occident have any separate bank account?

A. Well, I couldn't say.

Q. You never heard of any, did you?

A. I couldn't say.

Q. Their funds were—connected with this building, were never deposited in any separate trust, to your knowledge, or any separate account.

(Testimony of Charles S. Wills.)

A. Well, the ledger would show it, but I don't recall it. [75]

Q. Now, about this deed, you testified—did you read the entry in the minutes of the trustees concerning this deed?

A. Yes, I just read it.

Q. "It was further moved and carried that the real estate be transferred from Occident Trust Company to this company, but deed not placed of record for the present."

Was that matter discussed there at the meeting of the trustees at that time?

A. Well, I'm sure it was.

Q. Do you remember the discussion?

A. Well, I can't quite remember that, but I know about what the reason was.

Q. The reason was that you wanted to use the Occident Trust Company in the future, in the event there was any claims that might be asserted against the contractors in connection with the building, is that correct?

A. There was some—some unsettled matters, claims—some disputes.

Q. And was it definitely understood that the deed would not be put of record until those matters were settled?

A. Well, apparently from that resolution, that was [76] the reasoning.

Q. Then the deed was not to be considered to be delivered, was it, until those matters were settled?

(Testimony of Charles S. Wills.)

A. No, the transaction was closed. It was turned over, and——

Q. Well,——

A. ——as far as the books were concerned, it was a—a washout.

Q. Suppose some matters come up in the future, and it was necessary for Occident to assert a claim against the contractor, then how—what was your understanding about how that matter would be treated?

A. Well, that would be subject to adjustment and there would be—there would have to be a settlement of some kind.

Q. Was it contemplated that circumstances might arise under which the deed might be returned to Occident?

A. No. No.

Q. That is, the——

A. No, the—the whole thing was to close the affairs of the Occident Trust Company, and there would—it wouldn't have been withheld from record if there hadn't been some pending matters.

Q. Well, it was, though, to be withheld until those matters were cleaned up. [77]

A. Yes. The deed, however, was transferred to——

Q. Well, there wasn't really any physical delivery of the deed. It was—the deed was kept——

A. I prepared the deed and I gave it to the——

Q. Who did you give it to?

(Testimony of Charles S. Wills.)

A. —Seattle Hardware Company.

Q. Who did you give it to in the Seattle Hardware Company?

A. I couldn't tell you at this minute, but it was—went out of my possession.

Q. Well, you were—wasn't you an officer of both companies? A. No.

Q. You were just an officer of the one company.

A. That's right.

Q. And who—you just turned it over to one of the other members of the—

A. It might have been turned over to the attorney for filing. I'm not certain.

Q. Now, I believe you testified concerning the reasons for the formation of the company. Now that was, I suppose, was gained by talking to some of the other parties that had formed Occident.

A. This had all been done prior to my coming.

Q. Who did you talk to about that? [78]

A. Well, I don't know that I talked to anybody, but I heard the conversations in the meeting.

Q. Well, who did you hear talk about it?

A. Whoever were present at the meeting, and it might have been Mr. C. A. Black, Mr. C. H. Black, Mr. F. D. Black, Mr. M. D. Ballard, Mr. A. S. Burwell, Mr. R. P. Ballard.

Q. What in your—what, according to what they said, was the reason for Occident?

A. I beg your pardon?

Q. What—what did they say was the reason for the formation of Occident?

(Testimony of Charles S. Wills.)

A. Well, the Seattle Hardware Company was a trading concern, engaged in merchandising, and this was another venture, building a building, and it involved considerable liabilities and responsibilities and they thought the best way to—to overcome that was to have a separate corporation to do the work, to complete it, and to borrow money for its completion.

Q. Borrow it in the name of this separate corporation.

A. Occident—yes, Occident Trust Company.

Q. It was understood, wasn't it, that as soon as the building was completed, then the property would be transferred back? [79]

A. That, I don't know.

Q. You didn't hear anything said along that line one way or the other.

A. No.

Q. When was the building completed?

A. Well,—

Q. Approximately.

A. —it must have been sometime in 1905, just when I couldn't tell you.

Q. And when did Seattle move into the property—into the building?

A. Oh, somewhere from a year to a year and a half after I came. I don't remember just exactly.

Q. That would put it sometime in the early part of 1906, wouldn't it?

A. The latter part of 1905 or early part of 1906.

Q. And then as soon as they moved into the

(Testimony of Charles S. Wills.)

building, why, the property was deeded to Seattle Hardware Company, wasn't it?

A. Well, I don't know how soon, but——

Q. Wasn't it approximately the same time?

A. Well, that I couldn't say, but within a reasonable time after they got the building completed.

Q. Now the company—did the Occident Company own no other property except this property?

A. Not to my knowledge.

Q. And it had no other duties to perform except the holding of title of this property.

A. And building the building.

Q. And the construction of the building. Well, the construction of the building was all supervised by a Building Committee appointed by the Seattle Hardware Company, wasn't it?

A. Well, they were all interlocked there.

Q. They were all interlocked. Well, don't you know that the minutes of the Seattle Hardware Company provided for the appointment of a Building Committee to superintend the construction of the building?

A. I think that would be the natural plans, yes.

Q. So, they were looking after the construction of the building; they were advancing all the money for the construction of the building.

A. Well, I don't think all of the money.

Q. Well, where did the rest of the money come from?

(Testimony of Charles S. Wills.)

A. Well, I think there was some contribution there from the stockholders, just how much I don't know——

Q. Well, at any rate——

A. ——outside of the land itself.

Q. There wasn't any money put up by Occident because [81] they didn't have any bank account, did they? A. Well, I——

Mr. Jones: If Your Honor please, I think this is purely argumentative. Even the evidence shows that they had a hundred and fifty thousand dollar loan from a mortgage company.

The Witness: Travelers.

Mr. Jones: The Travelers Insurance Company, and I think it's purely argumentative. I didn't go into the financial accounts with the witness, but I——

The Court: He may answer. The objection will be overruled.

Mr. Miller: Read the question.

The Reporter: Question, there wasn't any money put up by Occident because they didn't have any bank account, did they?

A. I don't remember now, exactly, but I think that some of the stockholders borrowed money and put that—put it into the Occident Trust Company.

Q. Stockholders of who?

A. Of the Seattle Hardware and of Occident Trust.

Q. Well now, who are the stockholders of the Occident Trust?

(Testimony of Charles S. Wills.)

A. Well, there'd be M. D. Ballard, and there's C. H. Black, and F. W. Baker, and A. S. Burwell.

Q. Well, I thought that you—I thought that the Seattle Hardware Company was the real owner of the stock of the Occident Trust Company.

A. Well, Seattle Hardware was the real owner of the stock, but I—I think there was some money put up by—I can't tell you definitely because—

Q. Yes.

A. —I am only speaking from recollection.

Q. But the people that put it up, put it up because they were stockholders of the Seattle Hardware Company?

A. Oh, certainly, certainly.

Q. Not because of the nominal ownership of stock in the Occident Trust Company?

A. I don't know what the reason was for it, other than they wanted the building.

Q. Now do you know where the money came from originally that was used to buy these two lots? Was that ever discussed in the meetings?

A. No, that—I think that was done some—a number of—a few years before.

Q. You never heard that matter discussed, did you? A. No.

Q. Did you know Mr. Bronson—Ira Bronson?

A. Very well. Very well.

Q. He was attorney for the Seattle Hardware Company. A. That's correct.

Q. You knew that he had held deeds—a deed

(Testimony of Charles S. Wills.)

to this property for about two years, before it was turned over to Occident Trust, didn't you?

A. I don't know that I knew that until I heard it discussed here the other day. I wouldn't say

Q. And you don't know how the stock got from Mr. Bronson's name over into the name of the Seattle Hardware Company, or if it ever did. That's the stock in Occident.

A. I don't know the particulars of it, I know in my own mind, I think, but I don't know the particulars of it.

Q. Well, in your own mind, and from what you've seen and observed, what—what would you say?

A. Well, I think Mr. Bronson and two others organized the company, and subscribed for the stock; then they resigned and the other—then the Seattle Hardware officials came in and took their places and carried on the corporation.

Q. Bronson did that just as a nominee of the Seattle Hardware.

A. I presume so. I'm—I'm testifying that I—that's [84] the way I think it would be done. I don't know.

Q. You saw no indication any way along the line that Bronson was the real owner of this stock, at any time.

A. Well, he acted in a representative capacity, probably.

Q. And he was Seattle Hardware's regular attorney.

A. That's correct.

(Testimony of Charles S. Wills.)

Q. Now what were your duties in connection with the—there in 1904, '5 and '6, when you worked for the Seattle Hardware Company?

A. When I first went there I was credit manager and assistant treasurer, and trustee. Later, Mr. Baker resigned and I was made treasurer, and continued as trustee.

Q. During what period of time were you treasurer?

A. Well, I think I was made treasurer somewhere around 1908, and up to the time I sold my stock in the company on July 1st, of 1930.

Q. You were not treasurer, of course, during any of the time between 1901 and 1906?

A. No.

Q. You had nothing to do with the payment of any taxes on this property, prior to 1906, prior to the year 1906; and you don't know who paid the tax—who advanced the tax—the money that was used to [85] pay the taxes on this property?

A. I couldn't say.

Q. Well then, the only activities that you know of that the Occident Company performed, it held the title to this property and during the time that the building was constructed.

A. They not only owned—held the title, they owned the property and they built the building and borrowed the money to complete the building.

Q. You say they built the building, but of course the—all the actual supervision was done by offi-

(Testimony of Charles S. Wills.)

cers and employees of the Seattle Hardware Company wasn't it?

A. Well, they are both—a number of them are officers of both companies.

Q. I see. Well, did this Occident Trust Company ever—ever have any separate letterheads on which its letters were written out to the general public, or anything of that kind? That you know of?

A. Not that I recall.

Q. Was it ever listed as a separate corporation in the telephone directory?

A. Well, I couldn't say. The directory would prove that. I—I don't remember.

Q. You don't remember it. Did it ever declare and [86] pay any dividends?

A. That I couldn't say.

Q. Do you know how many meetings of the trustees were ever held during the time of its existence?

A. I couldn't say. I was not an officer.

Q. During the time that you were there, how many times did you attend trustees meetings of Occident?

A. I was not a trustee of the Occident Trust, and I was not——

Q. Well you was—you was an officer of Occident Trust, wasn't you? A. I was not.

Q. Well you had no connection, then, with Occident Trust Company.

A. None whatever. None whatever.

Q. So you don't know anything about their trus-

(Testimony of Charles S. Wills.)

tees meetings, or how often they had them, or anything of that kind. A. No, I didn't know.

Q. Or whether they ever did meet, or whether they——

A. No, the minutes would show that.

Mr. Miller: I think that's all. [87]

Redirect Examination

By Mr. Jones:

Q. Mr. Wills, did you know Mr. Wickersham, who was the architect on the construction of this building? A. Yes, very well.

Q. Do you know him well enough to recognize his writing? A. Yes. Yes, indeed.

Q. All right. I'll show you a couple of statements, and these will be offered in evidence, on the Pacific Wire and Cleaning Works, which have endorsed the bond for F. D. Wickersham, and what I would like to know is whether you can tell me who wrote in ink on the top of those "Occident Trust Company"?

A. Yes, this is Mr. Wickersham's writing, and I think that that's his writing "Occident Trust."

Mr. Jones: Mr. Miller, I have some more statements which are of a similar character, I mean where they—where they have been endorsed in the same way. I wondered if I could submit those to you and not ask Mr. Wills to go through all of them. They're of the same handwriting. I might—those are going to be included in an exhibit which will be

(Testimony of Charles S. Wills.)

just a folder consisting [88] of a number of statements, and I will have that identified as Plaintiff's 3, and we mark—might mark those 3a and b, if that's agreeable. Will that be all right?

The Court: Yes, if that identification is——

Mr. Jones: I have no other questions, if you would be willing to let that testimony stand as to similar—similar situations.

Mr. Miller: I will allow it. We have that agreement that——

Mr. Jones: Yes.

Mr. Miller: ——you will vouch for the——

Mr. Jones: Well, I can't vouch for Mr. Wickersham's writing, but I think that it's——

The Court: Mr. Wills, I want to ask you a question or two.

Q. Were you with the Seattle Hardware Company when the mortgage was executed to this——

The Witness: Yes. Yes, I was.

The Court: And as—were you treasurer at that time?

The Witness. No, I was assistant treasurer and trustee. [89]

The Court: Do you have any independent recollection, aside from what the records may show, as to who deposited this draft or whatever the document was that evidenced a hundred and fifty thousand dollars?

The Witness: I am sure it was Mr. F. W. Baker, as the treasurer.

(Testimony of Charles S. Wills.)

The Court: Well, was it deposited in the name—or in an account of the Occident Trust Company?

The Witness: That I couldn't say. I couldn't say. I don't know whether—the books would show whether it was——

The Court: Well, you—you didn't keep their books, though?

The Witness: No, we had a bookkeeper by the name of——

The Court: Well, do you have any independent recollection of them writing any checks in payment of construction costs on this building?

The Witness: No, I have no independent—I—

The Court: Do you have any recollection of the Seattle Hardware Company writing checks in payment of the costs of the [90] construction?

The Witness: Well, I'm quite certain that Seattle Hardware Company wrote the checks and charged them to the Occident Trust.

The Court: Who was M. M. Grout?

The Witness: He was the bookkeeper.

The Court: Of the Seattle——

The Witness: Seattle Hardware Company.

The Court: My reason for asking you is, I see he—he acted as——

The Witness: Notary.

The Court: ——notary in the making of this deed.

Do you recall who you—at whose request you drafted this deed, Plaintiff's Exhibit 1?

(Testimony of Charles S. Wills.)

The Witness: Well, that was following the meeting of the Board. I presume—well, Mr. Burwell or Mr. Black, whoever was looking after it.

The Court: Well, the deed is signed by Mr. Ballard as president of the Occidental Trust and Mr. C. H. Black as secretary. Well, was it at the request of either one of these men, or do you remember? [91]

The Witness: Well, I think it would be. I wouldn't recall.

The Court: You haven't any recollection.

The Witness: No, that's right.

The Court: They were also trustees of the Seattle Hardware?

The Witness: Yes, that's correct.

The Court: Then after you drafted the deed and after it was acknowledged by Mr. Grout, do you remember to whom it was delivered?

The Witness: Mr. Black, I am quite certain.

The Court: Mr. C. H. Black——

The Witness: C. H. Black, yes.

The Court: ——who was acting in a dual capacity as trustee for the one corporation and secretary of the other?

The Witness: That's right.

The Court: That's all, I just wanted to get that straight.

The Witness: May I see that deed a moment?

The Court: Yes.

The Witness: That brings back [92] memories.

(Witness Excused)

Mr. Jones: I offer in evidence as Plaintiff's Exhibit 1, the deed which has been marked and identified——

Mr. Miller: No objection.

Mr. Jones: ——and as——

The Court: It may be admitted in evidence.

(Whereupon the deed referred to was admitted in evidence as Plaintiff's Exhibit No. 1.)

Mr. Jones: ——Plaintiff's Exhibit 2, the minute book which has been marked and identified.

Mr. Miller: Of Seattle?

Mr. Jones: Of the Seattle Hardware Company, yes.

Mr. Miller: No objections.

Mr. Jones: Now, we can—we can discuss the way we will handle that at the end of the case. And I will offer—I'll withhold 3 for [93] the time being. I'll come to that in a minute; but I'll offer as Plaintiff's 4, an abstract——

Yes, two is marked and offered——

The Court: Yes, two will be admitted. I understand there is no objection.

(Whereupon the minute book of the Seattle Hardware Company was admitted in evidence as Plaintiff's Exhibit No. 2.)

Mr. Jones: As Plaintiff's Exhibit 4, a title trust company's abstract of Lots 1 and 2 in Block 327 of Seattle Tidelands.

Mr. Miller: No objection.

The Court: It will be admitted.

(Whereupon the abstract referred to was admitted in evidence as Plaintiff's Exhibit No. 4.)

Mr. Jones: I'll offer as Plaintiff's 5, the minutes of Occident Trust Company.

Mr. Miller: No objection.

The Court: It will likewise be admitted.

(Whereupon the minutes of the Occident Trust Company were admitted in evidence as Plaintiff's Exhibit No. 5.) [94]

Mr. Jones: I'll offer as Plaintiff's 6, the—a mortgage from Occident Trust Company to the Travelers Insurance Company, dated September 21st, 1905, for a hundred and fifty thousand dollars, a mortgage given by the Occident Trust Company.

Mr. Miller: No objection.

The Court: It will be admitted in evidence.

(Whereupon the mortgage referred to was admitted in evidence as Plaintiff's Exhibit No. 6.)

Mr. Jones: I'll offer as Plaintiff's Exhibit 8,—that last was seven wasn't it?

The Clerk: No, it was six.

Mr. Jones: Six? Oh yes, that's right. Plaintiff's Exhibit 7, a letter from the Secretary of the State of Washington, dated February 21st, 1948, advising that the Occident Trust Company was stricken from the records on August 23rd, 1909 for nonpayment of annual license fees.

Mr. Miller: No objection.

The Court: It will be admitted [95] in evidence.

(Whereupon the letter referred to was admitted in evidence as Plaintiff's Exhibit No. 7.)

Mr. Jones: I—I had intended to direct Your Honor's attention at this time to some of these minutes, but we've mentioned them pretty much in our conversations and I think perhaps we can let that go until the briefs, and we will call attention to them in the briefs.

Now, I want at this time to submit as Plaintiff's Exhibit 3, a quantity of vouchers, contracts, and so forth, miscellaneous items relating to the construction of this building. Their relevancy is the—lies in the fact that they are the contracts of the Occident Trust Company, or in the case of bills and statements, that they are directed to the Occident Trust Company.

I think we have submitted these to you, Mr. Miller.

Mr. Miller: Well, if you will vouch for them.

Mr. Jones: Well, they—I'll vouch for their being part of their—taken from the records of the Seattle Hardware Company. [96]

Mr. Miller: I haven't seen these, but then I assume they are part of—part of the files, whatever they are, but——

Mr. Jones: Yes, they are part of the files. And the—the two 3a and b, that were marked, should be made a part of this exhibit. I don't think we need to go through and undertake to letter them all intrinsically in themselves. No one of them is of any great consequence, but to—for instance, we have

here, given in April, August of 1904, June 23rd of 1905, and April 1904, four surety company bonds, guarantying to the Occident Trust Company, in each case, the performance of certain contracts for construction.

Then we have quite a large number of bills directed to the Occident Trust Company, certified to by the architect as correct for payment; and the general purport of them is to show that the construction was carried on and carried out by the Occident Trust Company.

The Court: Any objection, Mr. Miller?

Mr. Miller: No objection.

The Court: It may be admitted. [97]

(Whereupon the group of documents referred to were admitted in evidence as Plaintiff's Exhibit No. 3.)

Mr. Miller: I want to call the Court's attention to the fact that, in examining these, that some of these at least are made out on letterheads of the Seattle Hardware Company.

Mr. Jones: And I understand that it may be stipulated that in these cases where—some of these bills have—have been directed to the Seattle Hardware Company and a line drawn through them, such as in those two we referred to, and Occident Trust Company's name substituted, and in each case that substitution appears to be in the handwriting of Mr. Wickersham, and I understand that Mr.—the testimony that Mr. Wills gave with respect to the two

specific ones may be considered as running to those particular ones.

Mr. Miller: Well, I don't know that he covered all evidence.

Mr. Jones: No, I didn't ask him about anything——

Mr. Miller: Just in—just in the Wickersham—just in——

Mr. Jones: There may not be any [98] more. I'll just take a look and see if there are any more.

Mr. Miller: I don't think there are any more, as far as that goes.

Mr. Jones: I remember there were—well, I think that's probably right that those were the only——

Mr. Winter: I think there are two of them here, Mr. Jones.

Mr. Jones: Huhm?

Mr. Winter: There are two of them here. Of course the billings, that is, the book shows the account on the Seattle Hardware Company, within the Occident Trust Company——

Mr. Jones: Well now, I—I don't know where you got—we furnished these to you, didn't we? Well, I'd like to include these in—in this——

Mr. Miller: You can put these in if you want to.

Mr. Jones: ——include these in Exhibit 3, with that explanation that we referred to.

Mr. Miller: All right..

The Court: That may be entered.

Mr. Jones: Now this—this file [99] here that

is part of Exhibit 3, is significant only with respect to—it—it has on the front of it a letter from the City of Seattle Department of Public Works, dated April 7th, 1909, but it contains in the file a grant from Stetson-Post Mill Company to the Occident Trust Company for encroachment by reason of the construction of the new building; and that is the only significant part of that file, but I didn't want to destroy the file.

Mr. Miller: Here's another one if you want to put—include that along with the others.

Mr. Jones: I'm perfectly willing to put it in the——

Mr. Miller: That goes in your file, doesn't it?

Mr. Jones: All right. Well, put it in this Exhibit 3.

Mr. Miller: That will be part of Exhibit 3, then.

Mr. Jones: All right.

Mr. Miller: Just so there will be no confusion about these papers, they're miscellaneous papers and they can all be marked as Exhibit 3? [100]

Mr. Jones: Part of Exhibit 3.

Mr. Miller: Exhibit 3.

The Court: They may be so marked.

Mr. Jones: All right. Now those two that you have should go along with it.

Mr. Miller, are there any things that you have asked us to produce that we have—I have not produced?

Mr. Miller: Yes, I think you produced—we wanted—we wanted the books of Seattle and Occident.

Mr. Jones: Oh, yes. Yes, stock records a and b.

Mr. Miller: The stock book of Seattle. We asked you to produce that stock book.

Mr. Jones: No, I didn't understand it that you had asked for it. Is there some particular thing?

Mr. Winter: We wanted—at that time we wanted you to stipulate. As you recall, no stock was ever issued to Mr. Bronson for the land which he took title to.

Mr. Jones: By Seattle Hardware Company?

Mr. Winter: By Seattle Hardware Co. [101]

Mr. Jones: I—I will admit that so far as we can ascertain from the records, no stock appears to have been issued by the Seattle Hardware Company to Ira Bronson in connection with Lots 1 and 2 of Block 327, Seattle Tidelands. Does that meet your requirement?

Mr. Miller: Let the record show it is so stipulated.

Mr. Jones: Or that the Occident Trust Company issued stock.

Mr. Miller: Seattle never issued any of its stock to the Occident Trust Company. That's true.

Mr. Jones: Well, I think that's true. I can't conceive any circumstance under which Seattle would issue any of its stock to the Occident Trust Company.

Mr. Miller: Will you stipulate to that?

Mr. Jones: I will stipulate that we can find no record of any such transaction. Now, if I find—I—I—this is something that I didn't know you

wanted. If I find that there is anything to the contrary, why, we will let you know immediately, but I—I don't think there is a thing [102] on that.

Mr. Miller: Now, do you have that stipulation——

Mr. Jones: Suppose we offer the books and either party can refer to whatever portions of them they desire.

Mr. Miller: Do you want to offer the whole book?

Mr. Jones: Yes, we might just as well.

Well then, I'll—I'll offer as Plaintiff's Exhibit 8, a book of accounts——

Mr. Miller: Why not just offer this one page, page a hundred and ninety, and that's all that's necessary.

Mr. Jones: Well——

Mr. Miller: Unless you want to put it all in.

Mr. Jones: I can't tell from—it might be that some of your contentions will necessitate reference to some other parts of the book. From my standpoint, I don't see that any reference to the book is material now, but I might want to refer to something else.

Mr. Miller: Let's offer the [103] entire book.

Mr. Jones: Yes.

The Court: You're offering the entire book, with particular reference to a page in the book?

Mr. Jones: Mr. Miller has a reference to some particular page, but I think—as I understand, either party may be at liberty to call attention to other portions of the book.

The Court: Very well.

Mr. Miller: You offer the book, then, with particular reference to pages 190 and 191 of the book, which is the account of the Occident Investment.

The Court: Very well.

Mr. Jones: That will be as Plaintiff's 8.

Mr. Miller: Now did you identify that as to what number the book of Seattle——

Mr. Jones: No, I haven't identified it.

Mr. Miller: I just thought that—this is the ledger, and I understand that is the journal, is that right?

Mr. Jones: All right. Exhibit 8, [104] is general ledger (a)——

The Court: Of what corporation?

Mr. Jones: ——of the Seattle Hardware Company, and I'll offer as Exhibit 9, private ledger (b)—is that correct? Private ledger (b).

Mr. Winter: That's a general ledger, too, isn't it?

Mr. Jones: Well it's marked on the back "Private B," of the Seattle Hardware Co. and it has——

Mr. Winter: That follows—the entries in (a) follows in (b) with this account beginning with the Occident Investment Company in 1901 and this goes on through 1906, or seven or eight months after the date of February, 1906. This is a continuance of "8," Exhibit 8, then.

In case Your Honor wants to find those pages, they are on page 175, 176 and 177, and then there is one or two other pages in there with that account.

Mr. Jones: Now, in the back of this book, Exhibit 9, is a book entitled "Private Journal E." Do you want that in, Mr. Miller?

Mr. Miller: Well, it might as well go in along with the rest of it. I think—I think we do, yes.

Mr. Jones: Well, let—let it remain then where it is as a part of this exhibit.

Mr. Miller: All right. [105]

Mr. Jones: Is there anything further that you have asked us to produce?

Mr. Miller: Nothing except what I have here and I'll put these in evidence.

Mr. Jones: All right.

The Court: I would like to ask this question in connection with the mortgage, which has been offered in evidence here as Plaintiff's Exhibit 6. This mortgage makes specific reference to a fire insurance policy in the sum of a hundred and twenty-five thousand dollars that had to be carried on the property from and after the date of the mortgage. Is there anything in these books or records, or do you have any record of that fire insurance policy, the premiums that were paid thereon and by whom they were paid?

Mr. Jones: We—we have nothing—well, we do not have any copy of the policy. I would just be speculating if I undertook to answer Your Honor's question.

The Court: I think that the mortgage indicates that the party who placed it of record for filing, and to whom it was returned afterwards, it was filed

with the Thomas Investment [106] Company, were also the agents of the fire insurance company, who wrote the policy, and evidently collected the premiums.

Mr. Jones: Mr. Bronson represented that company, too, so I knew a good deal about the Thomas Investment Company, Mr. Hollen. When this case came up, I—he died many years ago—they had transferred the business to another concern, I've forgotten the name of it, but there is a successor; and I endeavored to get any records, but they said they have no—none of the records that far back, that they had not been kept.

Mr. Miller: May we stipulate, Mr. Jones, that the note that this mortgage secures, that's Plaintiff's Exhibit 6, has been lost, but that the original note was signed by the Occident Trust Company, and by the Seattle Hardware Company as guarantors?

Mr. Jones: May I see the note? Well, it was in the minutes; well, whatever is in the minutes would be there, and I——

Mr. Miller: Let's stipulate that the original note is lost.

The Court: Well, the mortgage itself recites that the note must be signed by the [107] Occidental Trust Company and the Seattle Hardware Company.

Mr. Jones: I—I think counsel——

The Court: Not as guarantor, but it just merely—it doesn't prescribe any guarantor, but merely——

Mr. Jones: I think counsel is correct, but I don't know——

Mr. Miller: I believe the mortgage would be sufficient.

Mr. Jones: The Plaintiff rests.

(Plaintiff rests.)

Mr. Miller: Now the defendant offers in evidence, Defendant's Exhibit A-1, which is a receipt signed by the City Treasurer of the City of Seattle, dated November 14th, 1902, showing a receipt of three hundred and thirty-six dollars and eighteen cents, for local improvement tax on Lots 1 and 2, showing it as having been received from Ira Bronson.

Mr. Jones: No objection. [108]

The Court: It will be admitted in evidence.

(Whereupon the receipt referred to and identified, was admitted in evidence as Defendant's Exhibit A-1.)

Mr. Miller: Now Defendant offers in evidence, Defendant's Exhibit A-2, which is a similar receipt showing received from the Seattle Hardware Company, six hundred and thirty-six dollars and thirty-three cents for local improvement tax on the East Twenty Feet of Each of Lots 1 and 2, in Block 327, of Seattle Tidelands Addition, signed by the Treasurer of the City of Seattle.

The Court: On what date?

Mr. Miller: November 22nd, 1902.

Mr. Jones: No objection.

The Court: It will be admitted.

(Whereupon the receipt referred to and iden-

tified, was admitted in evidence as Defendant's Exhibit A-2.)

Mr. Miller: Defendant offers in evidence, Defendant's Exhibit A-3, which is a receipt from the Treasurer's office, Seattle, King [109] County, Washington, received from Mr. Baker—I can't read——

Mr. Jones: F. W.

Mr. Miller: ——his initials. F. W. Baker, address, Seattle Hardware Company, showing taxes for the following described property for the year 1903. It includes the Seattle Tidelands, Lots 1 and 2, in amounts of five hundred and thirteen dollars and fifty cents, three hundred and ninety-six dollars and seventeen cents, and also taxes on four other lots at small valuations and in small amounts, total payment being eight hundred and eighty-nine dollars and seventy-eight cents, and I don't see any date on this receipt. Is it dated?

Mr. Jones: Well, it's marked "paid" March 15, 1904. It's 1903 taxes.

Mr. Miller: Paid, yes. It's marked "paid" March 15, 1904.

Mr. Jones: No objection.

The Court: It will be admitted.

(Whereupon the receipt referred to and identified, was admitted in evidence as Defendant's Exhibit No. A-3.) [110]

Mr. Miller: Defendant offers in evidence, Defendant's Exhibit A-4, which is a receipt from the Treasurer's office, Seattle, King County, Washing-

ton, showing payment of taxes for the year 1904. It's made out to S. W. Baker—F. W. Baker. It showed that payment was made on March 15, 1905, the total payment sixteen hundred and thirty-three dollars and eighty-five cents.

Mr. Jones: No objection.

The Court: It will be admitted in evidence.

(Whereupon the receipt referred to and identified, was admitted in evidence as Defendant's Exhibit No. A-4.)

JOHN B. MEALS

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Miller:

Q. State your name, Mr. Meals.

A. John B. Meals, M-e-a-l-s.

Q. And your business or occupation?

A. I'm a Certified Public Accountant. [111]

Q. You're employed by the Seattle Hardware Company——

A. Yes.

Q. ——the plaintiff in this action? And have you made an examination of the book account of the Occident Investment Company as it appears in the private ledger——

The Court: If you will pass your documents to the bailiff, Mr. Miller, the rule in this court is

(Testimony of John B. Meals.)

that the counsel remain back of the rail and the bailiff will pass the documents to the witness.

Mr. Miller: Yes, sir.

The Court: If you will get it, Mr. Bailiff. You'd better stay close there. He says it is.

Q. This is the account of the Occident appearing on Seattle's books. Now, you find that account, do you, Mr. Meals? You do?

A. I see an account "Occident Investment Company," is that what you are referring to?

Q. That's—that's it, the account. How was that account captioned or labeled in the beginning? Was it labeled "Occident Investment Company" or "Occident Trust Company"?

A. Well, the one that I have in my hand, it seems to be [112] dated 1901——

The Court: Speak up so we can hear you.

A. ——and it is labeled "Occident Investment Company."

Q. Does the account show when it was first corrected to read "Occident Trust Company"?

A. No, sir, it doesn't.

Q. There is nothing in the account to indicate—does it indicate that it ever was changed over to the Occident Trust Company?

A. This is an account for one year. Then it goes into succeeding ledgers after it's closed.

Mr. Miller: Would you pass this book to him and——

Q. I'll ask you to turn to see if there is anything in the second account——

(Testimony of John B. Meals.)

Mr. Jones: Would you just tell us what exhibit you are looking at?

The Court: What exhibit is it?

Mr. Miller: Exhibit 9. Exhibit 9.

The Court: 9-A, isn't it?

The Clerk: 9.

Q. Making special reference to July 1st, 1904, see if you can find any record showing a change in the name of the account about that date. [113]

A. At that point the name changes to Occident Trust Company.

Q. Now I wish you would turn to Exhibit 8, that's the first ledger, is it not? And taking the—some of the items appearing in that account, there is an item under date of April 19th, 1901, "Revenue stamps, twelve dollars." Do you find that?

A. Yes, sir.

Q. Do you find any—anything indicating what those revenue stamps were? A. No, sir.

Q. Those were—that was on the same day, was it not, that the deed was first made to Mr. Bronson?

A. I don't know, sir, I didn't follow that so closely.

Q. Does that item show—what does that item show with reference to a charge of that amount to the Occident Investment Company, or a payment by the Seattle Hardware Company?

A. Well, it simply shows a charge against a book account which is entitled "Occident Investment Company"—

(Testimony of John B. Meals.)

The Reporter: A little louder, please.

A. It shows a charge against a book account labeled "Occident Investment Company," for twelve dollars, [114] and it's described as "Rev Stamps." That's all I know about, of course.

Q. Now, going down the line a little bit further, with reference to some other items, do you find some items of rent, under dates of May or June, 1901?

A. No, I don't see any.

Q. Well,—or in April, 1901. Right at the very first of that account, don't you find three items showing a rent credit?

A. The word "rent" doesn't appear here, Mr. Miller.

Q. Do you find an item labeled Jones—Jones and McCoy, rent—

A. That's correct.

Q. —AC, rent account. How much is that item?

A. The first item seems to be May 31st, for four hundred twenty-five dollars.

Q. Now what does that—what does that account indicate with reference to how it was handled on the books?

A. Well, it indicates that this—the man in charge of these books received some rent and credited it to this Investment Company account, that's all.

Q. It indicates that the Seattle Hardware Company collected the rents and credited it to Occident Trust Company.

A. Yes, sir. [115]

Q. Or, Occident Investment Company, as it was

(Testimony of John B. Meals.)

then carried. Now, going down the line, does the account show anything with reference to such items as the purchase of nails, or lumber, or glass, such as would indicate repairs that were made on—on a—on the building, or on property then on the lots?

A. Yes, there has been several number of small items of nails, lumber——

Q. How were those items handled, what would the—the account indicate with reference to what happened as to those items?

A. It indicates that the account either purchased from the Seattle Hardware Company or had paid for the——

The Court: Now if you will speak up a little louder, I'm having difficulty to hear you.

A. It indicates that the Seattle Hardware Company either sold these items to this account, or paid somebody for these items for this account.

Q. And are those items charged to the Occident Investment Company? A. Yes, sir.

Q. They're debited to the Occident Investment Company? A. That's right. [116]

Q. Now going down the line to another item, showing cash, sixty thousand dollars, as of August 20th, 1901. Do you find that item?

A. Yes, I find an item "Cash Book 445," that's the only indication on it, sixty thousand dollars debit.

Q. Now right above there is an item showing a credit to cash of fifty-eight thousand, five hundred dollars on the preceding day.

(Testimony of John B. Meals.)

A. That's right.

Q. Now what—can you explain those items, as to what those items indicate?

A. Well, I can't from the ledger, explain those items, because they are posted in blank. They have no reference and anything that I made out of that would be a pure assumption.

Q. Well, do—do the items indicate that—that the Seattle Hardware Company expended sixty thousand dollars in cash for some purpose, and charged that item to the Occident Investment Company?

A. That would be the first indication, but the offsetting credit is what raises my doubt about it. I wouldn't know how to put those two together, and they obviously belong together.

Q. You mean the credit of fifty-eight thousand five hundred dollars? [117]

A. Yes, sir.

Q. That's the credit you're speaking about. Does that indicate to you that it was handled through some sort of a refinancing operation, by the Seattle Hardware Company?

A. Well, it has that appearance, yes, and that might be one answer to this.

Q. The Occident Company, then, was credited with fifty-eight thousand five hundred dollars, and debited with sixty thousand dollars?

A. Yes, sir.

Q. On two succeeding dates; and there is no explanation that you are able to find as to just how those items were handled?

(Testimony of John B. Meals.)

A. That's correct.

Q. Now going—can you follow this down through to 1902? I want to ask you about an item——

The Court: Let me ask you a question there, if I may. Then the sum total of those two entries would be that the Occidental (sic) Trust Company was indebted to the Seattle Hardware Company in the sum of fifteen hundred dollars.

The Witness: Yes, sir.

The Court: The difference between those two figures. [118]

The Witness: If we put them together, and I'm not sure that should be done. I have no explanation for the two entries.

Q. Now can you follow these accounts on down till we come to—well, let's first get into the year 1902. Do you find that year? You may have to go to the other ledger to find it.

First take an item as of February 18th, 1902, "Interest on sixty thousand dollars, fifteen hundred dollars." Do you find that item?

A. No, sir. I find on that date that interest—apparently Capitol Bank, something like that, eight hundred and seventy-five; and interest, Seattle National Bank, six twenty-five, which makes up the total, I suppose.

Q. Makes a total of fifteen hundred dollars.

A. That's right.

Q. And that was interest paid on sixty thousand dollars, was it? Does it show the principal or the amount the interest was paid on?

(Testimony of John B. Meals.)

A. It doesn't show the principal here.

Q. Then there's an item on——

The Court: Who—does it show who paid that?

The Witness: It simply shows that [119] the Occident Investment Company was charged interest in those two amounts. That's as far as I can go. Anything else would be an assumption.

The Court: I see.

Q. Wouldn't that indicate, in view of the nature of the account, that the Seattle Hardware Company paid that fifteen hundred dollars and charged it to Occident Trust Company?

A. Yes, sir.

Q. It would. Now on March 15th you have an item of taxes, three hundred and nineteen dollars and thirty cents. Do you find that item?

A. Yes, sir.

Q. And would it be true, Mr. Meals, that that item would indicate that Seattle Hardware paid those taxes and charged them to Occident?

A. That's right.

Q. Now coming—I want to ask you about one or two more of these, just to get the general character of these items. I think that—can you find—can you come down to 1904, the year 1904. First, I want to take an item of March 31st, 1904. Do you find that?

A. Yes, sir. [120]

Q. Do you have an item there marked "Capital Stock, sixty thousand dollars; bills payable, sixty thousand dollars," both debits on this account? Now, what does that item indicate?

(Testimony of John B. Meals.)

A. Well, I have an item marked with no reference, except the private journal, one hundred twenty thousand dollars.

Q. That's a debit to Occident of a hundred and twenty thousand dollars.

A. That's right, but there is no description in the ledger.

Q. There's no description in the ledger as to what that was. Is there any tie-up showing how that ties up in any way with the other sixty-thousand-dollar item that you've testified about?

A. I can give you the—I can read you the journal which results in this posting to the ledger.

Q. All right, if you'll do that.

A. The journal debit is Occident Investment Company, one hundred twenty thousand dollars, and the credit is to the capital stock, that is, capital stock of Seattle Hardware Company, sixty thousand dollars, and the additional credit is to bills payable of Seattle Hardware Company, sixty thousand dollars.

Q. Now, what would that indicate to you? [121]

A. Well that indicates—that indicates in the first, this is an assumption now, I should have to go further into these transactions, but I'm just trying to bring out the assumption that—that's what you want to know, isn't it?

Q. Yeah.

A. All right, it indicates that the Seattle Hardware Company assumed a payment of bills payable

(Testimony of John B. Meals.)

and charged them against Occident; in other words, it indicates to me that Occident owed sixty thousand dollars of bills payable, which was assumed by the Seattle Hardware Company. And the second half indicates that they considered their investment in the Occident Investment Company worth sixty thousand dollars more than the book showed and they credited their capital stock by way of appreciation.

Q. Well, do you find any record anywhere in this account where the Occident Trust Company owed any indebtedness of sixty thousand dollars? As assumed? A. No, sir, I don't.

Q. You don't know what that sixty thousand dollars was referred to, they—that was assumed. Could it have been the original purchase price of the lots in question? [122]

A. Well, it's the same amount, and it could have been. I wouldn't know.

Mr. Miller: I think that's all, Mr. Meals.

Cross-Examination

By Mr. Jones:

Q. Mr. Meals, do you find anything to distinguish between the account labeled Occident Investment Company and the account as it becomes Occident Trust Company, or does it appear to be all one account?

A. Well, I seemed to have lost track here at the moment. Perhaps Mr. Miller can tell me what that date was.

(Testimony of John B. Meals.)

Mr. Miller: What was that date you referred to?

The Witness: The date of the change in title.

The Court: It was 1901 to 1902, I think.

Mr. Miller: I'll give you that date in just a minute. July 1, 1904.

The Witness: 1904. [123]

The Court: Yes, that's right.

A. There is no indication why the title should be changed, the balance goes right forward from Occident Investment Company to Occident Trust Company.

Q. Now is there anything in these accounts that you've just been referring to, and that you have before you, to indicate whether or not they represented a separate activity of some concern which is labeled "Occident Investment Company" or "Occident Trust Company" as distinguished from Seattle Hardware Company?

A. Well, these accounts have the appearance of being accounts the same as they would have with any customer or any—anybody to whom they were selling merchandise.

Q. Does it imply a separate entity then, that—

Mr. Miller: I think I'll object to that.

The Court: Oh, he may answer.

Q. You may answer, Mr. Meals.

A. Well, the account title is "Occident Trust" or "Investment" or what have you, and just looking at this it would imply they are doing business with them the same as they would some other hard-

(Testimony of John B. Meals.)

were [124] company or some vendor, or anybody else. In other words, they—they don't have the appearance of an income account or an expense account, or an account which belongs to the company, an investment account, if that's what you mean.

Mr. Jones: That's all.

The Court: Well, what did you mean by saying this second sixty thousand dollars was an appreciation to the Seattle Hardware Company for their investment, or did I misunderstand you?

The Witness: I said that I assumed it was appreciation, because they credited their capital in that amount. That's the usual——

The Court: You mean the Seattle Hardware or the Occident——

The Witness: Seattle Hardware credited its capital in that amount, and charged it—its account with Investment——

The Court: I see.

The Witness: —in that amount.

The Court: I just wanted to get it clear. I was afraid that I had confused the two corporate entities. That's all. I just wondered.

Mr. Miller: Your Honor—— [125]

The Court: I think it's about time to——

Mr. Miller: I—I could finish here in five minutes, if your Honor wants to give me that long, and we would be through.

The Court: Very well.

(Testimony of John B. Meals.)

Mr. Miller: Will you mark these exhibits——

The Court: I understood you had a deposition that you filed.

Mr. Miller: No.

Mr. Jones: No, the deposition is being written and it won't be available until sometime tomorrow and possibly the next day, and the understanding we had was that, if it's agreeable to your Honor, that we can just——

The Court: Yes, I understand that.

Mr. Jones: —we will send it on over, and the case can be closed, except for that.

Mr. Kehoe: I don't assume your Honor would want us to get on the stand and read it to your Honor——

The Court: No, I don't mean read it, but just getting it into the record, but it would—it could be part of the record. [126]

Mr. Jones: We could file it as an exhibit in the—one of the Plaintiff's exhibits, can't we?

Mr. Miller: Yes, it can be received by agreement. We would be perfectly willing to have them file it.

The Court: You stipulate that it may be received as an exhibit in the case, or that it should be, by the court reporter, made a part of his record of the testimony of it.

Mr. Miller: It can be done either way. It's immaterial to us, whichever way you prefer to have it done.

(Testimony of John B. Meals.)

The Court: Well, when you get your statement of facts in the case, then of course the exhibits are separated from the oral testimony.

Mr. Miller: Well, maybe it better be made a part of the testimony in the case.

Mr. Jones: I—I think so.

The Court: That's all right.

Mr. Jones: Might—might be consider that between us, and when—we can indicate when we send it over which way it should be handled?

Mr. Miller: All right. Anything you—— [127]

The Court: I think it should be—if it's met all formalities of taking a deposition, I assume you agreed on that.

Mr. Jones: Yes, we did.

The Court: But it ought to become a part of the testimony.

Mr. Jones: Well, I think that's right. I think it should be made a part of the record.

Mr. Miller: Now, your Honor, I want to offer in evidence, the income tax returns that have been filed by the—and the excess profits tax returns, that have been filed by the Seattle Hardware Company for the years involved in this case, and also for the year 1940. I haven't had time to get photostats made before leaving Washington. I'd like to offer them in evidence, and we could withdraw and substitute photostatic copies.

Mr. Jones: What is the purpose of putting these in the record? I thought we had covered that—everything that related to them, by stipulation.

(Testimony of John B. Meals.)

Mr. Miller: Well, the purpose of the returns for all of the years was to show the [128] manner in which the plaintiff itself treated its invested capital. It's not conclusive of the plaintiff, we can see that; but it is evidence where the plaintiff itself sets forth the amount of invested capital it's entitled to, so it's offered, in other words, as sort of an admission against interest on the part of the plaintiff.

The Court: In reference to this particular problem.

Mr. Miller: That's right. In reference to the amount of the loss that was claimed, and also with reference to the amount of invested capital which the plaintiff claimed.

Mr. Jones: Well, I—I think I would have no objection to that, and I do not object to your substituting copies. I——

Mr. Miller: I'll make you a copy, if you would like to have it.

Mr. Jones: All right. I think our stipulation shows that sometime prior to the taxable years here involved they were required to use this basis, does it not? Does it, Mr. Kehoe?

The Court: Well, does your stipulation take care of depreciation from the date of the construction of the building down to [129] the years involved?

Mr. Jones: Yes, it does. We've agreed——

The Court: And that during a part of that construction period that the building was——

Mr. Jones: Yes, we——

(Testimony of John B. Meals.)

The Court: —held by—

Mr. Miller: That's not an issue in the case.

Mr. Jones: No. No, that isn't involved here. I know what counsel is talking about, but I thought we had covered it, Mr. Miller.

Mr. Miller: Well, let's see. I don't think so.

Then—then may I have—we withdraw the returns.

The Court: Yes, you may.

Mr. Miller: I'll take them back with me and I'll send in the copies.

The Court: All right.

Mr. Miller: Now the only other thing I had, I wanted to read to the Court a paragraph from the annual report to the stockholders of the Seattle Hardware Company for the year ending December 31st, 1905. This is an annual [130] report which was pasted into the minute book, Plaintiff's Exhibit 2, and the paragraph that I am reading is as follows:

The heading—Annual Report to the Stockholders of the Seattle Hardware Company for the year ending December 31st, 1905.

The year 1905 witnessed the completion of our new building. Thanks to the efforts of our building committee, we are now in a very comfortable home, well equipped to handle easily a business of two million dollars or more, which we propose to have for the year 1906.

The defendant rests.

(Testimony of John B. Meals.)

The Court: Is that page marked or indicated in any way, that you have read from?

Mr. Miller: I don't think it is, your Honor.

It's on—it's a —it's on page twenty-nine of the minute book. It's a sheet pasted over page twenty-nine.

Mr. Jones: Now, have these been [131] numbered?

The Court: Not yet.

Mr. Miller: Not yet. I would like to have it—get it numbered and have it received in evidence.

The Court: And you propose to substitute photostatic copies of those?

Mr. Miller: That is right.

The Court: That may be done.

Mr. Miller: We can probably give them one number.

Mr. Jones: Well yes, and I just want to ask Mr. Meals something about them, and I wanted to refer to them by number.

Mr. Miller: Give them one number, and show that they are all in evidence, subject to the right to substitute copies.

Mr. Jones: Mr. Meals, I would like to ask you something about Plaintiff's—or, Defendant's A-5. These are the income and excess profits returns of the Seattle Hardware Company for 1940 to 1945, as I understand it. I haven't had an opportunity to examine them.

The Witness: Yes, sir.

(Testimony of John B. Meals.)

Mr. Jones: But—as I understand [132] it also, they make a return or a declaration with respect to excess profits credit and possibly with respect to loss. That is different from the claim that the plaintiff is making in this suit. Did you prepare those returns?

The Witness: Yes, sir.

Mr. Jones: If it is a fact that there is a variance, can you tell the Court why you made them on the basis that you have made them?

The Witness: Well, the first income—the first excess profits tax question arose in 1940, that is, at the end of our fiscal year, November 1940. At that time we claimed as invested capital all these amounts which I—is being discussed today, and at some later time when the Revenue Agent came along, Mr. Black, when he made his report, he reduced this claim “Invested Capital Credit” by some hundred and twenty thousand dollars, which again, is the sort of thing we are talking about today.

The Seattle Hardware Company was in the peculiar position that in some years it was on the “Invested Capital Credit” basis, and in other years it was on the average of 1936, '39 earnings; but as long as only the invested capital [133] credit was involved, the amount there being some eight per cent of twelve hundred and, you know, was just too small to argue about and we didn't care to engage in the discussion during the war and keep all these years open, so that we acceded to the Revenue Agent's

(Testimony of John B. Meals.)

treatment and handled it that way until 1945. At that time this sale was made, and of course it became material to us and important to us to claim the original basis, which we had claimed in 1940.

And of course at that time we were obliged to reopen these old years by way of operating loss and carry-back.

Mr. Jones: That's all.

Mr. Miller: Let me ask you one question. What basis did you use for supporting the loss in 1945?

The Witness: Well, we used the same basis that we used on the returns, for the simple reason that we knew that this would have to be a claim for refund. There wasn't enough tax involved in 1945 to offset our loss, and we had to get it by way of refund anyway.

Mr. Miller: Well, you knew you didn't have to report this? [134]

The Witness: Pardon?

Mr. Miller: You knew that you didn't have to use this basis in the return, just because the Revenue Agent determined——

The Witness: All I can say is that I thought it was good judgment at that time, and being fully aware of this background of the claim that we intended to make.

Mr. Miller: And all of these other years you reported your invested capital, using the old base—the basis that had been determined by the Revenue Agent and was satisfied to proceed on this basis.

(Testimony of Charles S. Wills.)

The Witness: That is correct, yes, sir.

Mr. Miller: That's all.

Mr. Jones: That's all, Mr. Meals.

The Court: Now both sides rest, excepting the introduction in evidence of the deposition?

Mr. Jones: Except for the deposition.

The Court: And that will be introduced into this record as the Plaintiff's deposition—— [135]

Mr. Jones: Yes, sir.

The Court: —or Defendant's?

Mr. Jones: I know that Mr. Miller would like to submit this case on briefs, and I think that it is the proper way to submit the case.

The Court: It certainly is if we deal with the legal phases of it; but on the factual issue, there is—it's just a matter of what the facts establish and what inferences you draw from them.

I see no reason for any extended brief, because first the fact must be determined, and the primary fact here is, was this property originally acquired by the plaintiff through agents, trustees, and other representatives, based upon this record as it is made, when we get the rest of it; or was it not. If it was, then that fact if it were determined in the affirmative, would—wouldn't call for these—I don't know just what your calculations would result in. And I'm willing to have you submit the—a written brief upon that; but I wanted to clear that out of the way. And if I should determine that this was a corporation that must be looked upon as separate

and apart from the plaintiff corporation, and that the plaintiff [136] corporation made the investment that they contend for in their complaint here, then we get into these other questions.

Mr. Jones: Well, I—I know what your Honor has in mind. I think we can approach it that way. I think that the question, however, is not exactly as you stated, because the authorities that I am prepared to submit will show that even if the Seattle Hardware Company had acquired the land in its own name, and then turned it in to a bona fide separate corporation, that the same results would follow.

The Court: Was the Occidental Trust Company able by separate corporation or——

Mr. Jones: That—that—yes—that is——

The Court: —or was it mere alter ego——

Mr. Jones: Yes——

The Court: —of the Seattle Hardware Company, for the purpose——

Mr. Jones: Yes.

The Court: —of carrying through this transaction?

Mr. Jones: Yes, I think—I think [137] that is the real question, but not whether the Seattle Hardware Company first acquired the property as its own, or something of that kind, because even if it had first acquired it as its own, or even if its agent acquired it before it—before the Occidental Trust Company was formed, still if it was a bona fide separate corporation for a legitimate business pur-

pose, the result would be the same as if it had been formed wholly apart from the Seattle Hardware Company, in my judgment. Now——

The Court: Before any citation of authorities becomes useful in this matter, we must make a disposition of these facts, as we find them from the record as made.

Mr. Jones: And the—the determination of the facts, at the same time involves to some extent the authorities as to what is recognized as a bona fide separate company, or what in law is regarded as simply an alter ego, not to be given a separate identity. There—that requires a consideration of legal authorities.

The Court: Well, I have quite a number of matters on the calendar. I don't want to superficially pass upon this case, though I [138] assume it will be appealed, however I may hold. And I don't want either, to have counsel delay with themselves and then, in turn, the Court, by briefs that cite authorities upon all the many phases of direct and indirect holdings of property and of direct trusts and indirect trusts, because we——

Mr. Jones: I think—I think we can get right down to very specific cases.

The Court: —can just brief the whole field of those things.

Mr. Jones: We've got some very direct authorities on what is recognized as separate holding or not. And I think that—I think I understand the—the limitation that your Honor desires us to follow in our opening brief, and if you indicate what time

you would like to have it, we can—I think we would like to have two weeks, wouldn't we, Mister——

The Court: I am perfectly willing that you do have two weeks on it.

Mr. Jones: If we should need a little more time, I take it that there is no objection to it. We will endeavor to get our first brief in in two weeks.

Mr. Miller: We will want the record transcribed, I suppose. Two weeks after we get the record.

Mr. Jones: Yes, I think we should have the record transcribed. De you want to—and then if we can have two weeks from the time the record is available, why, we will undertake to meet that.

Mr. Miller: All right. Whatever time you take, I suppose we will take——

Mr. Jones: Oh well, you can——

Mr. Miller: —to handle it.

Mr. Jones: You may need more time than that.

Mr. Miller: Well, would it be too much to ask thirty days for the——

The Court: For your reply brief, you mean?

Mr. Miller: Yes.

The Court: I'm perfectly willing that you—that you should have——

Mr. Jones: We may—we may need 30 days because I anticipate that we may have more to say on our—our reply to you than we do originally. [140]

Mr. Miller: You mean that you'll take thirty on your opener?

Mr. Jones: No, of course not. We'll file or meet the opening in two weeks after the record is available.

Mr. Miller: And I take thirty days.

Mr. Jones: And you take thirty days, and we will try and get ours in as soon as we can, but we might want thirty days—I don't know.

The Court: If I had before me the deposition of the witness that will go into the record, and were a little more familiar with the stipulated facts—I have hurriedly glanced through them—I probably would find it comparatively easy to make a disposition of the very first question that is bothering the Court, and that, did Mr. Bronson put his own sixty thousand dollars into the property, or did the Seattle Hardware Company. Now have you stipulated on that fact?

Mr. Jones: We haven't stipulated, but I—there is nothing in the record to show that Mr. Bronson put his own sixty thousand dollars into the property; neither is there anything definitely to show whose sixty thousand he put in. It looks as if they may have borrowed the money from some financing agency, on the property. [141]

The Court: That is, who borrowed it?

Mr. Jones: Occident Trust Company.

Mr. Miller: The Seattle Hardware Company.

Mr. Jones: Well, that's—that's a question. We can't tell——

The Court: Well, the Occident Trust Company wasn't in existence at the time of the original acquisition of the property, was it?

Mr. Miller: Yes, it was.

Mr. Jones: Yes, it was.

Mr. Miller: Four days, I think.

Mr. Jones: Yes.

Mr. Miller: It was organized——

The Court: It was then being carried on the books as the Occident Investment Company?

Mr. Miller: Yes, it was.

The Court: Well, I'm a little confused there. I thought the Investment Company was——

Mr. Jones: No, that——

The Court: ——the name assumed prior to the coming into being of the corporate entity, but I——

Mr. Miller: It didn't get the [142] properties until October 1903. It was carried in Bronson's name until then.

The Court: Well——

Mr. Miller: Now there is one other thing, Your Honor, that may—in preparing these briefs, I was wondering if it would be possible for both parties—I'm speaking for myself, and I am sure Mr. Jones would join me in this—to withdraw the original exhibits and give a receipt for them, for use in preparing the briefs.

The Court: Unless there is some objection.

Mr. Jones: No, there is no objection.

The Court: That may be done, and a minute entry might be made to the effect that either party may withdraw exhibits for the purpose of preparing briefs.

We will adjourn court until ten o'clock tomorrow morning.

(Whereupon adjournment was taken until 10:00 o'clock a.m., May 5, 1948.)

[Endorsed]: Filed USDC June 4, 1948. [143]

United States District Court, Western District
of Washington, Southern Division

No. 1059

SEATTLE HARDWARE COMPANY,
Plaintiff,

vs.

CLARK SQUIRE, Collector of Internal Revenue,
Defendant.

OPINION

This is an action brought under section 24 (5) of the Judicial Code as amended and as qualified by section 3772 of the Internal Revenue Code as amended, for the recovery of income and excess profits taxes, alleged to have been erroneously and illegally assessed and collected for the fiscal years 1941 to 1945, inclusive, excepting the year 1942.

The question presented here is whether the corporate entity of the Occident Trust Company should be recognized in connection with the record ownership of certain real property prior to the time such property was formally transferred by it to plaintiff herein, the Seattle Hardware Company, on February 21, 1906. The question is succinctly stated by plaintiff in its brief, to wit: Was the property owned by Occident Trust Company or the Seattle Hardware Company?

I shall refer to the Seattle Hardware Company as "taxpayer" and to the Occident Trust Company as "Occident."

The taxpayer was organized as a corporation and began doing business, engaged in the wholesale hardware business in Seattle, in March, 1885. It prospered and expanded with the rapid growth of the city during the years following its establishment. A summary of the facts as I find them is that, in 1901, long before the days of federal income taxes, as well as before the days when workmen's compensation laws were in existence in this state, taxpayer desired to acquire two lots adjoining the one it then owned, upon which it intended to erect a building sufficiently large to meet its then needs and its needs through the future years.

A deed of conveyance, dated April 19, 1901, from Stetson & Post Mill Company to Ira Bronson evidenced the purchase of the property desired by taxpayer, the consideration therefor being \$60,000, which was paid by taxpayer. The purchase was made by Bronson as taxpayer's agent, and for the reason the taxpayer believed a better bargain could be obtained by dealing in this manner. Ira Bronson at all times held title to this property in trust for the true owner, the taxpayer.

On April 15, 1901, at the direction of taxpayer, Mr. Bronson, together with two other persons not identified with taxpayer in any manner, organized the Occident Trust Company as a corporation, and Bronson subscribed for the entire capital stock of this corporation, as is evidenced by its articles of incorporation. These articles of incorporation were filed with the secretary of state two days later,

April 17, 1901. On the same day that the articles of incorporation were executed by Mr. Bronson and his coinorporators, they all resigned. There was no stock certificate ever issued to Bronson by the corporation for all or any part of its capital stock, and neither money nor property passed from Mr. Bronson, nor any other person or corporation, to Occident for any of its capital stock. Occident never issued stock to anyone, as it kept no stock book. However, on the day of the execution of its articles of incorporation, following the resignation of its incorporators, M. D. Ballard, F. W. Baker, and C. H. Black, trustees and stockholders of the taxpayer, were elected to fill the vacancies of those resigned; and on April 18th, at a meeting of the stockholders of Occident, M. D. Ballard was elected president; F. W. Baker, treasurer; and C. H. Black, secretary, though they were not legally chosen for these positions since there was no one representing Occident either as incorporator or as stockholder to choose them.

On September 1, 1903, taxpayer set up a building committee to perfect plans for the erection of a building on the lots in question, legal title to which was then in the name of Bronson, its attorney. It employed architects and took all the essential steps for the construction of the building desired by it. It carried through all negotiations in the way of financial obligations for the construction of such building. It paid all the costs for the construction of the building, though it had them charged on its

accounts to Occident. It also, during this period of time, and in the whole period of time from the original acquisition of this property until the completion and acceptance of the building, paid all the taxes and assessments against the property; and it collected the receipts produced from certain minor rentals before the old buildings that stood upon the property were removed to make way for the new corporation.

On October 1, 1903, a warranty deed, executed by Bronson and wife to Occident, for a recited consideration of \$100,000, was placed of record. There was no actual consideration whatever passing from Occident to Bronson either in money or in stock. Construction of taxpayer's building, in accordance with its plans and specifications, under orders and directions of its building committee, was undertaken by taxpayer.

September 21, 1905, it having been found that additional funds would be required to complete the construction of the building, taxpayer negotiated for a loan of \$150,000 for the purpose of securing such funds. A note and mortgage were given, the mortgage being signed by Occident and the note by Occident and taxpayer, as well as by certain members of taxpayer's board of directors as individuals. The money produced by this mortgage went into the treasury of taxpayer, and all principal and interest on account thereof was paid by taxpayer.

On February 21, 1906, which was a few months after the completion of the building, a deed was

executed by Occident through its officers, who purported to act as such, conveying the property from Occident to taxpayer, subject to the existing mortgage of \$150,000. This conveyance was held by taxpayer until January 20, 1908, when it was filed for record. Thereafter, Occident entirely passed out of the picture, and taxpayer, which had previously paid the annual license fee of Occident, no longer made such payments, so that, in due time thereafter, under the laws of the State of Washington, Occident as a corporation was stricken from the rolls. There never was a liquidation of Occident, since it had no assets from the time it was incorporated until being stricken by the secretary of state for failure to pay its annual license fee.

The purchase price of the lots in question in this last transaction, the conveyance from Occident to taxpayer, was set up in the books of taxpayer as being \$225,000. This was the appreciated value of the property from the time it was first acquired by taxpayer in 1901 to the time of the formal conveyance by Occident to it.

In 1945, taxpayer sold the property here in question at a figure that would result in a substantial loss if its initial cost be considered as 225,000, the sum of money represented to have been paid to Occident upon conveyance of this property to it. If the base figure for cost be taken as the amount of money taxpayer paid through its attorney, Bronson, in 1901, for the acquisition of the property, \$60,000, then the sale of the property in 1945 would

show a profit and support the taxes assessed and collected herein.

It is clearly established in this case that taxpayer paid in actual money no more than the original \$60,000 which was furnished to Bronson, its attorney, when the property was purchased on its behalf. The property while in Bronson's name was held by him as the agent and representative of taxpayer and for taxpayer's use and benefit, subject to its orders and directions, and the same condition prevailed during all the time title stood in the name of Occident. The sole purpose and object of acquiring the property in question by taxpayer was to construct a building suitable for the business being carried on by it to meet its immediate and prospective needs. The passing of title from Bronson to Occident, and the holding of such title by Occident, was to relieve taxpayer from any liability that might arise during the course of construction of the building. The paper transactions relating to the ownership of this property did not remove it from the assets of taxpayer from the date of its acquisition in 1901.

Mr. Roy P. Ballard, who for many years was treasurer of taxpayer, is the only person now living familiar with the facts during the years here in question. He was in intimate touch with everything that took place during that time. He testified by deposition in this case, due to physical illness. His testimony, in a large measure, supports the facts as I have heretofore stated them.

The facts other than those testified to by Mr. Ballard are found in the documentary evidence introduced herein, particularly plaintiff's exhibit No. 5, being the only record of Occident, and which, I find, was the only record it ever had; plaintiff's exhibit No. 8, being the private ledger and monthly statement of taxpayer; and plaintiff's exhibit No. 2, the minute book of taxpayer.

From the facts as I have found them, we have presented the issue of law as to whether Occident ever, in fact, was more than a nominal holder of the property here in question. I am forced to the conclusion that it was not a corporate structure acting in any sense as an independent entity; and that it never was more than an instrumentality created by taxpayer temporarily to hold title for taxpayer, and nothing more, during its short and incomplete existence as a corporate structure. Its officers were only nominally such, since there was no one to choose them initially after the resignation of the original incorporators. At no time during its existence did it have outstanding any of its capital stock, because none had ever been issued.

The consideration of \$225,000 recited as going from taxpayer to Occident is a fictitious one, and the property here in question, at all times following the date of its acquisition by Mr. Bronson in April, 1901, was, and continued to be, the property of taxpayer. Its cost to taxpayer was the original \$60,000 paid therefor through Mr. Bronson; and this sum is the actual investment made by taxpayer upon

which it was entitled to calculate its liability for taxes during the years here involved, and as indicated by its income excess profits tax returns for those years.

It is clear that the only investment in money that taxpayer ever made in this property was the \$60,000 it furnished to its attorney, Bronson, for the acquisition of the property in 1901, and all that took place until formal conveyance by Occident to taxpayer of the property here, following the period of construction by taxpayer of the building, were acts of taxpayer, and not of Occident. This in no way added to the original cost of the property to taxpayer. In other words, looking through form and applying substance, as established by the facts, taxpayer had an actual investment of \$60,000 in this property; and, therefore, the figures used in making its tax returns during the years here involved must be accepted as correct.

Exceptionally able briefs have been submitted by both sides in this controversy. I can see no good purpose that would follow an analysis of the many cases cited. There is no serious dispute as to the law. The only issue of law is whether the facts bring this case within the well-known rule of "separate entity."

There are two cases that taxpayer relies upon very heavily. One is *Haskell v. McClintic-Marshall Co.*, 1923, 289 Fed. 405, from this circuit, and the other is *Moline Properties v. Commissioner of Internal Revenue*, 1943, 319 U. S. 436. A reading of

these two cases readily distinguishes the facts in them from the facts here found. In the Haskell case, the distinction is at once noticeable because there the corporate structure was in all respects a completely organized corporation. It carried on activities within the limits of its articles of incorporation. It issued stock. It kept books and records. It assumed responsibilities, many of which were entirely independent of its parent, the banking corporation, and it had a purpose for its existence beyond that of being the mere alter ego or agent or conduit of its parent corporation. What is true of the Haskell case is also the situation in reference to the Moline case.

The plaintiff also cites, and relies upon, the following cases, among others, all of which the court has examined and finds them readily distinguishable on the facts:

Commissioner of International Revenue v. Laughton, 113 F. 2d 103;

Rogan v. Starr Piano Co., 139 F. 2d 671;

New Colonial Ice Co., Inc. v. Helvering, 292 U. S. 435;

Higgins v. Smith, 308 U. S. 473.

The defendant cites, among many others, the following cases as establishing the exception to the general rule of an independent entity:

Minnesota Tea Co. v. Helvering, 302 U. S. 609;

Gregory v. Helvering, 293 U. S. 465;

Commissioner of Internal Revenue v. Court Holding Co., 324 U. S. 331;

Helvering v. Clifford, 309 U. S. 331;

Commissioner of Internal Revenue v. Tower, 327 U. S. 280;

Corliss v. Bowers, 281 U. S. 376;

United States v. Brager Bldg. & Land Corp., 124 F. 2d 349.

The cases cited by defendant all support the conclusion here reached, that Occident was not an independent legal entity, but merely a fully controlled agency or instrumentality through which taxpayer operated.

Having determined the basis from which values must be calculated to be that upon which taxes have been paid, the plaintiff's action will be dismissed. Appropriate findings of fact and conclusions of law and decree may be submitted upon notice.

Dated this 30th day of December, 1948.

/s/ CHARLES H. LEAVY,

United States District Judge.

[Endorsed]: Filed Dec. 30, 1948.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff objects to the following proposed Findings of Fact on the grounds that each thereof is contrary to, and unsupported by the evidence in this case.

I.

The first sentence of proposed Finding 7, reading as follows: "On or about April 19, 1901, Plaintiff purchased Lots No. 1 and 2, Block 327, Seattle Tidelands, King County, Washington, from Stetson & Post Mill Company."

The underlined portion of the third sentence of proposed Finding 7, reading as follows: "The consideration for the property was \$60,000 which was paid by the plaintiff."

The fourth, fifth and sixth sentences of proposed Finding 7, reading as follows: "The purchase was made by Bronson as plaintiff's agent and for the reason the plaintiff believed a better bargain could be obtained by dealing in this manner. From April 19, 1901, to October 1, 1903, Bronson held title to this property in trust for its true owner the plaintiff. At the time of the purchase of the property Bronson was plaintiff's attorney as well as its agent."

II.

The following portion of proposed Finding 8:

“There were no stock certificates ever issued to Bronson by the corporation for all or any part of its capital stock, and neither money nor property passed from Mr. Bronson, nor any other person or corporation, to Occident for any of its capital stock. Occident never issued stock to anyone, as it kept no stock book.”

III.

The following portion of proposed Finding 9: “On September 1, 1903, plaintiff set up a building committee to perfect plans for the erection of a building on the lots in question, legal title to which was then in the name of Bronson, its attorney. Plaintiff employed architects and took all the essential steps for the construction of the building desired by it. It carried through all negotiations in the way of financial obligations for the construction of such building. It paid all the costs for the construction of the building; though it had been charged on its accounts to Occident. It also, during this period of time, and in the whole period of time from the original acquisition of the property until the completion and acceptance of the building, paid all of the taxes and assessments against the property; and it collected the receipts produced from certain minor rentals before the old buildings that stood upon the property were removed to make way for the new corporation.”

IV.

The following portion of proposed Finding 10:

“There was no actual consideration whatever passing from Occident to Bronson either in money or in stock. Plaintiff then undertook the construction of its building, in accordance with its plans and specifications, under orders and directions of its building committee.”

V.

All of Proposed Finding 11, reading as follows: “On September 21, 1905, it having been found that additional funds would be required to complete the construction of the building, plaintiff negotiated for a loan of \$150,000 for the purpose of securing such funds. A note and mortgage were given, the mortgage being signed by Occident and the note by Occident and plaintiff, as well as by certain members of plaintiff’s board of directors as individuals. The money produced by this mortgage went into the treasury of plaintiff, and all principal and interest on account thereof was paid by plaintiff.”

VI.

The underlined portion of the first sentence of proposed Finding 12, as follows: “On February 21, 1906, which was a few months after the completion of the building, a deed was executed by Occident through its officers, who purported to act as such, conveying the property from Occident to plaintiff, subject to the existing mortgage of \$150,000.”

The last sentence of proposed Finding 12, reading as follows: “There never was a liquidation of Occident, since it had no assets from the time it was

incorporated until being stricken by the Secretary for failure to pay its annual license fee."

VII.

The last sentence of proposed Finding 24, reading as follows: "Plaintiff made no objection to the Commissioner's action for several years thereafter and used the \$60,000 basis in computing its invested capital credit in its returns for the fiscal years ended November 30, 1942, to 1945, inclusive."

VIII.

The first sentence of proposed Finding 25, reading as follows: "Plaintiff paid in actual money no more than the original \$60,000 which was furnished to Bronson, its attorney, when the property was purchased on its behalf."

The third and fourth sentences of proposed Finding 25, reading as follows: "The sole purpose and object of acquiring the property in question by plaintiff was to construct a building suitable for the business being carried on by it to meet its immediate and prospective needs. The passing of title from Bronson to Occident, and the holding of such title by Occident, was to relieve plaintiff from any liability that might arise during the course of construction of the building."

IX.

The first sentence of proposed Finding 27, reading as follows: "Occident was in fact never more

than a nominal holder of the property here in question."

The last sentence of proposed Finding 27, reading as follows: "At no time during its existence did it have outstanding any of its capital stock, because none had ever been issued."

X.

The first portion of proposed Finding 28, reading as follows: "The consideration of \$225,000 recited as going from plaintiff to Occident is a fictitious one, and the property here in question, at all times following the date of its acquisition by Mr. Bronson in April, 1901, was, and continued to be, the property of plaintiff. The cost of Lots 1 and 2, Block 327, Seattle Tidelands, King County, Washington, was the original \$60,000 paid therefor through Mr. Bronson."

XI.

The first sentence of proposed Finding 29, reading as follows: "The only investment in money that plaintiff ever made in this property was the \$60,000 it furnished to its attorney Bronson for the acquisition of the property in 1901."

The last portion of proposed Finding 29, reading as follows: "This *is* no way added to the original cost of the property to plaintiff. In other words, looking through form and applying substance, as established by the facts, plaintiff's actual investment in the lots and buildings was represented by the actual unadjusted cost of \$60,000 for the two

lots and \$244,000 for the buildings. Therefore the figures used in making its tax returns during the years involved as adjusted by the Commissioner must be accepted as correct in determining gain or loss on the sale of the property in 1945, and in computing invested capital credits for the fiscal years ended November 30, 1941, to 1945, inclusive.”

Plaintiff objects to the following proposed Findings of Fact on the ground that each thereof is not a proper finding of fact, but the statement of a conclusion of law, and that each thereof is unsupported by the Findings of Fact and is contrary to and unsupported by the evidence in this case.

I.

The following portion of the last sentence of proposed finding 8, reading as follows: “though they were not legally chosen for these positions, since there was no one representing Occident, either as incorporator or as stockholder, to choose them.”

II.

The second sentence of proposed Finding 25, reading as follows: “During the time the property was in Bronson’s name, it was held by him as the agent and representative of plaintiff, and for plaintiff’s use and benefit, subject to its orders and directions, and the same conditions prevailed during all the time title stood in the name of Occident.”

III.

The last sentence of proposed Finding 25, read-

ing as follows: "The paper transactions relating to the ownership of this property did not remove it from the assets of taxpayer from the date of its acquisition in 1901."

IV.

The second and third sentences of proposed Finding 27, providing as follows: "It was not a corporate structure which acted in any sense as an independent entity, and it was never more than an instrumentality created by plaintiff temporarily to hold title to the property for plaintiff and nothing more during its short and incomplete existence as a corporate structure. Its officers were only nominally such, since there was no one to choose them initially, after the resignation of the original incorporators."

V.

The underlined portion of the first sentence of proposed finding 29, reading as follows: "The only investment in money that plaintiff ever made in this property was the \$60,000 it furnished to its attorney, Bronson, for the acquisition of the property in 1901, and all that took place until formal conveyance by Occident to Plaintiff of the property, following the period of construction by plaintiff of the building, were acts of the plaintiff and not of Occident."

Plaintiff objects to all of the proposed Conclusions of Law, except number 6 thereof, providing as follows: "Plaintiff is not entitled to recover anything for the fiscal year ended November 30,

1942, for the further reason that its claim for refund for that year was not filed within the time prescribed by statute."

Respectfully submitted,

/s/ JONES & BRONSON,

/s/ H. B. JONES,

/s/ A. R. KEHOE,

Counsel for Plaintiff.

Copy received this 2nd day of March, 1949.

/s/ THOMAS R. WINTER.

[Endorsed]: Filed March 3, 1949.

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR ADDITIONAL
FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Plaintiff requests the court to make the following additional Findings of Fact:

I.

As an addition to defendant's proposed Finding 8, after deletion as proposed in plaintiff's Objections, the Court should find "At the first meeting of the Board of Trustees of the Occident Trust Company, held on April 15, 1901, Ira Bronson subscribed for 1000 shares of stock of the company in the amount of \$100,000.00, this being the entire capital stock of the company. He then offered to convey Lots 1 and 2, Block 327, Seattle Tide Lands, to the company in full payment of his subscription to the stock. The Board of Trustees after stating

“Whereas, said property is of a value of upward of \$100,000.00,” authorized the issuance and delivery of the stock fully paid and non-assessable, to Ira Bronson, in consideration of transfer of the lots to the company. Stockholder and Trustee meetings were held on April 18, 1902; April 17, 1903; April 15, 1904, and April 21, 1905. At the Stockholders meeting of April 15, 1904, the stockholders discussed the advisability of constructing a large brick building on the company’s property. The Secretary of the Occident Trust Company was instructed to proceed with plans for the construction of a large brick building upon the company’s property, which consisted of Lots 1 and 2 of Block 327, Seattle Tide Lands. The Secretary was authorized to make contracts for all material necessary, and then proceed as soon as possible with the work.”

II.

As an addition to defendant’s proposed Finding 9, after deletions as proposed in plaintiff’s Objections, the Court should find “Occident Trust Company entered into contracts for the construction of the building. The Contractor’s bond of Donaldson Brothers, relating to the construction of the building, ran to the Occident Trust Company. The contractor’s bond of H. W. Holly, ran to the Occident Trust Company. The contractor’s bond of Ernest Carstens ran to the Occident Trust Company. The contractor’s bond of Soderberg & Hill ran to the Occident Trust Company. Invoices of H. W. Holly, F. M. McClallam, T. E. Jones, Wash-

ington Steam Heating Co., D. E. Fryer & Company, Washington Iron Works Co., George W. Church, Soderberg & Hill, and Index Granite Works, all ran to the Occident Trust Company. Invoices of Pacific Wire and Plating Works, and J. C. Mill & Piper Company, ran to the Seattle Hardware Company, but these were changed by A. Wickersham, architect, to the Occident Trust Company."

III.

As an addition to defendant's proposed Finding 12, after deletions as proposed in plaintiff's Objections, the Court should find "After the conveyance by Occident to plaintiff on February 21, 1906, Occident was left without assets of any kind whatsoever."

IV.

The period at the end of defendant's proposed Finding 23 should be stricken and there should be added the following: "except for adjustments covered by jeopardy assessments as provided in Paragraph 5 of the Pre-Trial Order herein."

Plaintiff requests the Court to make the following Conclusions of Law as an addition to defendant's proposed Conclusions of Law after deletions proposed in plaintiff's Objections:

I.

The transfer of title of Lots 1 and 2, Block 327, Seattle Tide Lands, by the Occident Trust Company to Seattle Hardware Company, on February 21, 1906, was a liquidation of Occident Trust Company by its parent, Seattle Hardware Company.

The basis of Seattle Hardware Company for gain or loss and invested capital credit in the property is the fair market value of the stock of Occident Trust Company at the time of the liquidation which in turn is the fair market value of the assets of Occident Trust Company at the time of the liquidation or \$224,322.00, the agreed value of the land plus \$270,751.38, the agreed cost of the improvements, the latter being subject to adjustments, additions and depreciation.

II.

The defendant will propose a recomputation of taxes for the fiscal years ended November 30, 1941; November 30, 1943; November 30, 1944, and November 30, 1945, in accordance with this Court's decision, giving effect therein to any adjustments of the taxes which may be proper under the provisions of law, and if such computations are agreed to by the plaintiff herein, that shall become the basis for the judgment to be entered herein. If the parties are unable to agree on said recomputations, this Court reserves jurisdiction to decide the differences in a further and final hearing to be held at this Court's convenience.

Respectfully submitted,
JONES & BRONSON,
/s/ H. B. JONES,
/s/ A. R. KEHOE.

Counsel for Plaintiff.

Copy received this 2nd day of March, 1949.
Thomas R. Winter.

[Endorsed]: Filed March 3, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT

1. This is an action brought under Section 24(5) of the Judicial Code, as amended, and as qualified by Section 3722 of the Internal Revenue Code, as amended, for the recovery of income and excess profits taxes for the fiscal years ended November 30, 1941, to 1945, inclusive, in the amount of \$202,681.10, plus interest.

2. Plaintiff is a corporation duly and legally organized under the laws of the State of Washington. Its articles of incorporation were filed March 17, 1885, and it has been in continuous existence since that date and during the period of its existence has been engaged in the wholesale hardware business in Seattle, Washington.

3. The defendant is now and has been since March 6, 1941, the duly appointed, qualified and acting Collector of Internal Revenue for the collection district of Washington, having his office and residing at the City of Tacoma, Washington, in the jurisdiction of this Court; that the acts done by the defendant as herein stated were done in his representative capacity and under and pursuant to the direction of the Commissioner of Internal Revenue of the United States.

4. For the fiscal years ended November 30, 1941, to November 30, 1945, inclusive, plaintiff kept its books and records and filed its income, declared value excess profits, and excess profits tax returns

on the accrual basis and on the basis of fiscal year ended November 30th.

5. This Court finds the facts as set out in Paragraphs 5, 6, 7, and 8 of the stipulation of the parties herein which relate to the dates and amounts of the payment of the taxes here involved and the filing of tax returns.

6. After its incorporation in 1885, plaintiff prospered and expanded with the rapid growth of the City of Seattle which continued during the years of its existence. In 1901, long before the dates of federal incomes taxes and before the dates when workmen's compensation laws came into existence in the State of Washington, plaintiff desired to acquire two lots adjoining the one it then owned upon which it intended to erect a building sufficiently large to meet its then needs and its needs through the future years.

7. On or about April 19, 1901, plaintiff purchased Lots Nos. 1 and 2, Block 327, Seattle Tidelands, King County, Washington, from Stetson & Post Mill Company. A deed of conveyance dated April 19, 1901, from Stetson & Post Mill to one Ira Bronson evidenced the purchase of the property desired by plaintiff. The consideration for the property was \$60,000 which was paid by the plaintiff. The deed of conveyance was dated April 19, 1901. The purchase was made by Bronson as plaintiff's agent and for the reason the plaintiff believed a better bargain could be obtained by dealing in this manner. From April 19, 1901, to October 1, 1903, Bronson

held title to this property in trust for its true owner the plaintiff. At the time of the purchase of the property Bronson was plaintiff's attorney as well as its agent.

8. On April 15, 1901, at the direction of the plaintiff, Bronson, together with two persons not identified with plaintiff in any manner, organized the Occident Trust Company as a corporation, and Bronson subscribed for the entire capital stock of this corporation as is evidenced by its articles of incorporation which were filed with the Secretary of the State two days later, April 17, 1901. On the same day that the articles of incorporation were executed by Mr. Bronson and his coinorporators, they all resigned. There were no stock certificates ever issued to Bronson by the corporation for all or any part of its capital stock, and neither money nor property passed from Mr. Bronson, nor any other person or corporation, to Occident for any of its capital stock. Occident never issued stock to anyone, as it kept no stock book. However, on the day of the execution of its articles of incorporation, following the resignation of its incorporators, M. D. Ballard, F. W. Baker, and C. H. Black, trustees and stockholders of the plaintiff, were elected to fill the vacancies of those resigned; and on April 18, 1901, at a meeting of the stockholders of Occident, M. D. Ballard was elected president; F. W. Baker, treasurer, and C. H. Black, secretary, though they were not legally chosen for these positions since there was no one representing Occident either as incorporator or as stockholder to choose them.

9. On September 1, 1903, plaintiff set up a building committee to perfect plans for the erection of a building on the lots in question, legal title to which was then in the name of Bronson, its attorney. Plaintiff employed architects and took all the essential steps for the construction of the building desired by it. It carried through all negotiations in the way of financial obligations for the construction of such building. It paid all the costs for the construction of the building; though it had been charged on its accounts to Occident. It also, during this period of time, and in the whole period of time from the original acquisition of the property until the completion and acceptance of the building, paid all of the taxes and assessments against the property; and it collected the receipts produced from certain minor rentals before the old buildings that stood upon the property were removed to make way for the new corporation. Occident kept no books of its accounts being carried on plaintiff's ledger. It maintained no offices separate from those of plaintiff and had no separate bank account. It neither declared nor paid any dividends during its corporate existence.

10. On October 1, 1903, a warranty deed, executed by Bronson and wife to Occident, for a recited consideration of \$100,000, was placed of record. There was no actual consideration whatever passing from Occident to Bronson either in money or in stock. Plaintiff then undertook the construction of its building, in accordance with its plans and specifications, under orders and directions of its building committee.

11. On September 21, 1905, it having been found that additional funds would be required to complete the construction of the building, plaintiff negotiated for a loan of \$150,000 for the purpose of securing such funds. A note and mortgage were given, the mortgage being signed by Occident and the note by Occident and plaintiff, as well as by certain members of plaintiff's board of directors as individuals. The money produced by this mortgage went into the treasury of plaintiff, and all principal and interest on account thereof was paid by plaintiff.

12. On February 21, 1906, which was a few months after the completion of the building, a deed was executed by Occident through its officers, who purported to act as such, conveying the property from Occident to plaintiff, subject to the existing mortgage of \$150,000. This conveyance was held by plaintiff until January 20, 1908, when it was filed for record. Thereafter, Occident entirely passed out of the picture, and plaintiff, which had previously paid the annual license fee of Occident, no longer made such payments, so that, in due time thereafter, under the laws of the State of Washington, Occident as a corporation was stricken from the rolls. There never was a liquidation of Occident, since it had no assets from the time it was incorporated until being stricken by the Secretary of State for failure to pay its annual license fee.

13. The purchase price of the lots in question in this last transaction, the conveyance from Occident to plaintiff, was set up in the books of plain-

tiff as being \$225,000, which represented the appreciated book value of the property from the time it was first acquired by plaintiff in 1901, to the time of the formal conveyance by Occident to plaintiff.

14. In 1919, plaintiff acquired Lot No. 3, Block 327, Seattle Tidelands, King County, Washington, for a cash payment of \$60,291.15.

15. In the fiscal year ended November 30, 1945, plaintiff sold Lots No. 1, 2 and 3, Block 327, Seattle Tidelands in King County, Washington, with improvements thereon, and certain furniture and fixtures, for the gross sales price of \$125,000, the selling expenses being \$4,584.30, and the net selling price being \$120,415.70. In its income tax return for 1945, plaintiff reported a loss on the sale of \$166,847.16.

16. The basis for loss equivalent to that used in plaintiff's 1945 tax return but stated in greater detail, is as follows:

Cost of Lots 1 and 2		\$ 60,000.00
Paving		3,922.99
Lot 3		60,291.15
Paving		1,872.03
Building cost:	\$469,569.05	
Depreciation	321,224.83	148,344.22
<hr/>		
Furniture and fixtures, cost	22,743.75	
Depreciation:	9,911.28	12,832.47
<hr/>		
Total		\$287,262.86

The loss was computed as follows:

Cost less depreciation	287,262.86
Selling price less expenses sale	120,415.70
	<hr/>
Loss reported	\$166,847.16

The table below sets forth the contentions of the plaintiff and defendant herein as to the correct basis before additions, depreciation, and adjustments for determining loss on property sold by plaintiff during the fiscal year ended November 30, 1945, and for determining the equity invested capital for excess profits tax purposes under Section 718, Internal Revenue Code.

		Plaintiff Per Complaint	
	Per Returns	or Claim	Defendant
Land	\$ 60,000.00	\$224,322.00	\$ 60,000.00
Bldgs.	244,000	297,502.70	244,000.00
Total	\$304,000.00	\$521,824.70	\$304,000.00

The loss on sale of land and buildings by plaintiff as allowed by the Commissioner of Internal Revenue in the determination of taxpayer's income and excess profits tax liability for the year ended November 30, 1945, was computed as follows:

Plaintiff's basis for determining loss,	
as set forth above	\$287,262.86
Selling price less sale expenses	\$120,415.70
	<hr/>
Loss per return	\$166,847.16

17. The building account in the amount of \$244,000 with later additions and adjustments became

the \$469,569.05 building cost used for purposes of determining gain or loss in reporting the sale in the 1945 return. The \$244,000, with later additions, was likewise used for purposes of determining equity invested capital as it related to building costs in the returns for 1941 through 1945.

18. In its 1941 income and excess profits tax return in reporting invested capital credit, Seattle Hardware Company used the book basis of Lots 1 and 2, namely \$220,000. The return was audited by the Commissioner of Internal Revenue and an additional assessment of \$26,220.27 was made on January 8, 1945, based in part on adjusting invested capital credit by reducing equity invested capital for Lots 1 and 2 from \$220,000 to \$60,000.

19. The ultimate taxes determined and paid for 1941, 1942, 1943, 1944 and 1945 were in part on the basis of a reduction in equity invested capital for Lots 1 and 2 to \$60,000.

20. The \$60,000 cost for Lots 1 and 2 was used by plaintiff for purposes of determining gain or loss in reporting the sale in the 1945 return.

21. The fair market value as of February 21, 1906, of the land (Lots 1 and 2) was \$224,322 and of the building was \$270,751.38. Defendant does not admit that these values are correct as to any other date either before or after February 21, 1906.

22. The plaintiff herein filed claims for refund for the income and excess profits taxes herein involved all of which were timely filed except the claim

for refund for the fiscal year ended November 30, 1942, which claim for refund was barred by the statute of limitations at the time it was filed.

All of the claims for refund were transmitted by the defendant to the Commissioner of Internal Revenue. More than six months elapsed after the receipt of the claims by the defendant and the Commissioner and the bringing of this suit and at the time this suit was brought said claims had neither been officially allowed nor rejected by the Commissioner.

23. If the base figure of \$60,000 for the two lots and \$244,000 for the building are accepted as correct as used by plaintiff in its returns in determining gain or loss on the sale of the lots and building, then gain or loss on the sale of the lots and building has been correctly determined by the Commissioner.

24. In its excess profits tax returns for the fiscal year ended November 30, 1941, plaintiff used a basis of \$220,000 for Lots 1 and 2, in reporting invested capital credit. The Commissioner thereafter reduced this basis to \$60,000. Plaintiff made no objection to the Commissioner's action for several years thereafter and used the \$60,000 basis in computing its invested capital credit in its returns for the fiscal years ended November 30, 1942, to 1945, inclusive.

25. Plaintiff paid in actual money no more than the original \$60,000 which was furnished to Bronson, its attorney, when the property was purchased on its behalf. During the time the property was in Bronson's name, it was held by him as the agent

and representative of plaintiff and for plaintiff's use and benefit, subject to its orders and directions and the same condition prevailed during all the time title stood in the name of Occident. The sole purpose and object of acquiring the property in question by plaintiff was to construct a building suitable for the business being carried on by it to meet its immediate and prospective needs. The passing of title from Bronson to Occident, and the holding of such title by Occident, was to relieve plaintiff from any liability that might arise during the course of construction of the building. The paper transactions relating to the ownership of this property did not remove it from the assets of taxpayer from the date of its acquisition in 1901.

26. The controversy in the case at bar as to the basis of the property sold and as to its cost bases in determining invested capital credit relates only to Lots 1 and 2 and the building constructed thereon. There is no controversy over the basis of Lot No. 3 and the furniture and other personal property involved in the 1945 sale.

27. Occident was in fact never more than a nominal holder of the property here in question. It was not a corporate structure which acted in any sense as an independent entity; and it was never more than an instrumentality created by plaintiff temporarily to hold title to the property for plaintiff, and nothing more, during its short and incomplete existence as a corporate structure. Its officers were only nominally as such, since there was no one to

choose them initially after the resignation of the original incorporators. At no time during its existence did it have outstanding any of its capital stock, because none had ever been issued.

28. The consideration of \$225,000 recited as going from plaintiff to Occident is a fictitious one, and the property here in question, at all times following the date of its acquisition by Mr. Bronson in April, 1901, was, and continued to be, the property of plaintiff. The cost of Lots 1 and 2, Block 327, Seattle Tidelands, King County, Washington, was the original \$60,000 paid therefor through Mr. Bronson. The sum of \$244,000 represents the unadjusted cost of the building which plaintiff paid out of its own funds and which amount with later additions and adjustments made up the sum of \$469,569.05 used in plaintiff's building account, was the sum used as cost of the building in determination of gain or loss on the building.

29. The only investment in money that plaintiff ever made in this property was the \$60,000 it furnished to its attorney Bronson for the acquisition of the property in 1901, and all that took place until formal conveyance by Occident to plaintiff of the property here, following the period of construction by plaintiff of the building were acts of the plaintiff and not of Occident. This in no way added to the original cost of the property to plaintiff. In other words, looking through form and applying substance, as established by the facts, plaintiff's actual investment in the lots and building was represented

by the actual unadjusted cost of \$60,000 for the two lots and \$244,000 for the building. Therefore the figures used in making its tax returns during the years involved as adjusted by the Commissioner must be accepted as correct in determining gain or loss on the sale of the property in 1945, and in computing invested capital credits for the fiscal years ended November 30, 1941, to 1945, inclusive.

30. The following is a brief abstract of the contentions of the respective parties:

(a) The plaintiff contends that in determining invested capital credit for purposes of computing excess profits taxes for the fiscal years ended November 30, 1941, through November 30, 1945, inclusive, and in determining basis for purposes of computing gain or loss on the sale of the property in the fiscal year ended November 30, 1945, plaintiff is entitled to a basis of cost for Lots 1 and 2 of \$224,322, and a cost for improvements of \$270,751.38, subject to adjustments, additions and depreciation.

In the alternative and in the event it is held the \$224,322 and \$270,751.38 cost is not applicable, then plaintiff contends that it is entitled to the cost per the books of Lots 1 and 2, viz., \$220,000, for purposes of determining invested capital credit for the fiscal years ended November 30, 1941, through November 30, 1945, inclusive, and for purposes of determining the basis to be used in computing gain or loss on the 1945 sale.

(b) The defendant contends (1) that plaintiff acquired Lots Nos. 1 and 2 in April, 1901, at a cost

of \$60,000 before additions and improvements. That the cost to plaintiff of constructing the building before adjustments covered by jeopardy assessments hereinafter referred to, was \$244,000, and that such amounts have been properly used in plaintiff's returns and by the Commissioner of Internal Revenue in determining invested capital credit for the fiscal years ended November 30, 1941, to November 30, 1945, inclusive, and as an unadjusted basis for loss on the 1945 sale. (2) Defendant further contends that although the evidence may show that the legal title of Lots 1 and 2 on which the building was constructed was carried in the name of Ira Bronson (plaintiff's attorney) from April 19, 1901, to October 1, 1903, and in the name of Occident Trust Company from October 1, 1903, to February 21, 1906, that plaintiff was during all of said time, in substance and reality, the owner of the property, and that the said Ira Bronson and the said Occident Trust Company were in truth and reality mere agents, nominees, or instrumentalities of the plaintiff, and held the title to the said property for and on behalf of the plaintiffs and as plaintiff's agents, trustees, or nominees. Defendant consequently contends that for tax purposes it should be held that the plaintiff was in substance and reality the purchaser of the property in 1901 and as having constructed the building upon said property. Consequently the cost should be determined by what was paid for the lots and for construction of the building, rather than by the fair market

value of the land and building on the date said property was deeded to plaintiff by said Occident Trust Company.

(3) Defendant does not admit or concede that the Occident Trust Company was legally a wholly-owned subsidiary of the plaintiff, nor that there was a liquidation of said Occident Trust Company in February 1906, as contended by the plaintiff to have been carried out by a distribution of its assets in liquidation in exchange for stock. Defendant does not admit or concede that there was a liquidation of the Occident Trust Company prior to the year 1909 when the corporate existence of said Occident Trust Company was terminated for non-payment of corporate fees.

(4) Defendant further contends that under the provisions of Sections 113(a)(11), 113(a)(15), and 112(b)(6), Internal Revenue Code, no gain or loss shall be recognized where property is received by a corporation distributed in complete liquidation of another corporation, or when property is acquired during an affiliation. It is contended that under said Sections that even if plaintiff is correct as to the proper cost basis of the property, no gain or loss being recognizable under the facts in this case, plaintiff would not be entitled to a deductible loss on account of the 1945 sale or to invested capital credit for the years 1941 to 1945, inclusive, except upon the basis of the original actual amounts expended for the land and construction of the building.

5. Plaintiff's alternative contention is not covered by its claim for refund.

6. The property acquired by plaintiff on or about February 21, 1906, from Occident Trust Company was not property previously paid in for stock, as paid in surplus or as a contribution to capital within the provisions of Section 718(a)(2), Internal Revenue Code, so as to be includible in invested capital under Section 718, Internal Revenue Code, and said property did not constitute accumulated earnings and profits within Section 718(a)(4), Internal Revenue Code.

CONCLUSIONS OF LAW

1. Occident during the time it held title to Lots 1 and 2, Block 327, Seattle Tidelands, King County, Washington, was never more than a nominal holder of the property. It was not a corporate structure that acted in any sense as an independent entity, and was never more than an instrumentality, agency or department created by the plaintiff for the purpose of temporarily holding title to the property which it did and nothing more during its short and incomplete existence as a corporate structure. Lots 1 and 2 were originally acquired by plaintiff through its agent Bronson at a cost of \$60,000, and the sum of \$60,000 represented the actual and only investment which plaintiff made in the property.

2. The building involved was constructed at a cost of \$244,000 which amount was paid out and expended by plaintiff and which represents the total investment of plaintiff aside from later additions and improvements and expenditures represented in plaintiff's building account, in said building.

3. In determining the amount of plaintiff's deductible loss if any for the fiscal year ended November 30, 1945, under the provisions of Section 23(f), Internal Revenue Code, upon the sale of Lots 1 and 2, Block 327, Seattle Tidelands, and the building later constructed thereon, the correct basis is the cost of the property which in this case is measured by the amounts paid by the plaintiff for the lots and the amounts laid out and expended for the construction of the building or \$60,000 and \$244,000, respectively.

4. Even if it be assumed as contended by plaintiff that in determining plaintiff's invested capital credit for excess profits tax purposes under Sections 714-718, Internal Revenue Code, that plaintiff is entitled to include Lots 1 and 2, Block 327, Seattle Tidelands, King County, Washington, and the building as property paid in for stock, paid in surplus, or contributions to capital under Section 718 (a)(2), at the basis of cost, the invested capital credit has been correctly determined on the basis of unadjusted cost of the lots \$60,000 and of the building \$244,000.

5. The Commissioner has therefore correctly used the unadjusted basis of \$60,000 for Lots 1 and 2, and \$244,000 for the building in determining the amount of deductible loss for the fiscal year ended November 30, 1945, and the amount of property paid in to be included in invested capital under Section 718(a)(2), Internal Revenue Code, for each of the fiscal years ended November 30, 1941, to 1945, inclusive.

6. Plaintiff is not entitled to recover anything for the fiscal year ended November 30, 1942, for the further reason that its claim for refund for that year was not filed within the time prescribed by statute.

7. The taxes involved in this action have been properly assessed and collected and plaintiff has failed to establish that it has overpaid its taxes for any of the years involved.

8. Plaintiff is entitled to take nothing from this defendant in this action.

9. The costs of this action are taxed against this plaintiff.

10. In view of the findings and conclusions herein, it will be unnecessary to consider and pass upon the additional contentions of the defendant as set out in the Pre-Trial Order of this Court.

Plaintiff excepts and exceptions allowed.

/s/ CHARLES H. LEAVY,
United States District Judge.

Entered this 11th day of April, 1949.

Copy received this 2nd day of March, 1949. A. R. Kehoe, Attorney for Plaintiff.

[Endorsed]: Filed April 11, 1949.

In the District Court of the United States for the
Western District of Washington, Southern
Division

No. 1059

SEATTLE HARDWARE COMPANY,
Plaintiff,

vs.

CLARK SQUIRE, Collector of Internal Revenue,
Defendant.

JUDGMENT ORDER

The above-entitled action having duly come on to be heard at a term of the District Court of the United States for the Western District of Washington, Southern Division, before the Honorable Charles H. Leavy, United States District Judge, and the issues of fact having been submitted by the respective parties to the court without a jury, evidence heard and briefs submitted, and the plaintiff having appeared by its attorneys Jones & Bronson, Seattle, Washington, and the defendant having appeared by J. Charles Dennis, United States Attorney, Tacoma, Washington; Thomas R. Winter, Special Assistant to Chief Counsel, Bureau of Internal Revenue, Seattle, Washington, and Homer R. Miller, Special Assistant to the Attorney General, Washington, D. C., and the court having rendered its decision and filed its opinion on the 30th day of December, 1948, and having entered its findings of fact and conclusions of law herein, and having found

for the defendant and that the plaintiff is not entitled to recover anything from the defendant upon its complaint, and directing that judgment be entered accordingly.

Now on motion of J. Charles Dennis, United States Attorney, Tacoma, Washington, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, Seattle, Washington, it is hereby

Ordered and Adjudged that the complaint of the plaintiff herein, Seattle Hardware Company, be and the same hereby is dismissed upon the merits thereof, and it is further

Ordered and Adjudged that the defendant recover of the plaintiff herein, Seattle Hardware Company, the sum of \$33.20, its costs and disbursements, taxed in said action.

Dated, Tacoma, Washington, this 11th day of April, 1949.

Plaintiff excepts and exceptions allowed.

/s/ CHARLES H. LEAVY,

United States District Judge.

[Endorsed]: Filed April 11, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Seattle Hardware Company, Plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final Judgment dated April 11, 1949, and filed in the above-entitled Court on April 11, 1949.

Dated this 3rd day of May, 1949.

/s/ A. R. KEHOE,

Attorney for the Plaintiff.

Copy of the within and foregoing Notice of Appeal mailed to the United States Attorney, Tacoma, and to Thos. R. Winter, Special Attorney, Bureau of Internal Revenue, Seattle, Washington, this 10th day of May, 1949.

/s/ E. E. REDMAYNE,

Deputy Clerk.

[Endorsed]: Filed May 9, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To: The Clerk of the Above-Entitled Court:

Plaintiff, Seattle Hardware Company, by and through its attorneys of record, Jones & Bronson, and A. R. Kehoe, Esq., hereby designates the entire record in this case to be contained in the record on appeal.

JONES & BRONSON,

By /s/ A. R. KEHOE,

Of Counsel for Plaintiff.

Copy Received this 16th day of May, 1949.

/s/ THOMAS R. WINTER,

Special Assistant to the Chief Counsel, Bureau of Internal Revenue.

[Endorsed]: Filed May 17, 1949.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the undersigned respective counsel for plaintiff and defendant in the above-entitled cause that all of the original exhibits admitted in evidence at the trial of this cause, to wit: plaintiff's Exhibits Nos. 1 to 9, inclusive, and defendant's Exhibits A-1 to A-5, inclusive, may be transmitted with the Transcript of the Record on Appeal to the Circuit Court of Appeals for the Ninth Circuit.

JONES & BRONSON,

By /s/ A. R. KEHOE,

Of Counsel for Plaintiff.

/s/ THOMAS R. WINTER,

Of Counsel for Defendant.

[Endorsed]: Filed May 17, 1949.

[Title of District Court and Cause.]

ORDER

This Matter having come on for hearing at a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 17th day of May, 1949, the Honorable Charles H. Leavy, United States District Judge presiding, upon the motion of A. R. Kehoe, Esq., of counsel for plaintiff, for an order to transmit the original exhibits admitted in evidence in the trial of this cause to the Circuit Court of Appeals with the Transcript

of the Record on Appeal herein, and it appearing that a stipulation has been entered into by and between counsel for plaintiff and Thomas R. Winter, Esq., of counsel for defendant, providing for transmittal of said original exhibits; now, therefore

It Is Hereby Ordered that the Clerk of this Court be, and he is, hereby directed to transmit to the Circuit Court of Appeals for the Ninth Circuit with the Transcript of the Record on Appeal herein, the original exhibits in this cause, to wit: plaintiff's Exhibits Nos. 1 to 9, inclusive, and defendant's Exhibits A-1 to A-5, inclusive.

/s/ CHARLES H. LEAVY,

United States District Judge.

Presented by:

/s/ A. R. KEHOE,

Of Counsel for Plaintiff.

O.K.

/s/ THOMAS R. WINTER.

[Editorial]: Filed May 17, 1949.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents, That we, Seattle Hardware Company, a corporation, as Principal, and Saint Paul-Mercury Indemnity Company of Saint Paul, a corporation of the State of Delaware, authorized to become sole surety on bonds in the State of Washington, as Surety, are held and firmly bound unto Clark Squire, Collector of Internal Revenue, defendant above named, as Ob-

ligee, in the penal sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, administrators, successors and assigns, jointly and severally, firmly by these presents.

Dated and Sealed this 17th day of May, 1949.

Whereas, on the 11th day of April, 1949, the above entitled Court rendered and entered a judgment or decree in the above-entitled cause in favor of the above-named obligee,

And Whereas, said Seattle Hardware Company, Plaintiff, feeling aggrieved by said judgment or decree and desiring to appeal from the same to the Circuit Court of Appeals of the United States of America and perfect said appeal by this bond;

Now, Therefore, the Conditions of the Above Obligation Is Such: That if the said appellant will pay all costs and damages that may be awarded against it on said appeal or on the dismissal thereof, not exceeding Two Hundred Fifty and No/100 (\$250.00) Dollars, then this obligation shall be void; otherwise to remain in full force and virtue.

SEATTLE HARDWARE
COMPANY,

By JONES & BRONSON and
/s/ A. R. KEHOE.

Its Attorneys.

SAINT PAUL-MERCURY INDEMNITY
COMPANY OF SAINT PAUL.

[Seal] By /s/ Signature Illegible.

Attorney in Fact.

[Endorsed]: Filed May 17, 1949.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the undersigned respective counsel for plaintiff and defendant in the above-entitled cause, that the following record listed in the Clerk's Certificate to Record on Appeal, be omitted from the Record on Appeal, and that in so far as the original designation of content of Record on Appeal is inconsistent herewith, that the designation of content of Record on Appeal be amended to conform hereto: First,

The following records listed in the Clerk's Certificate on Appeal be omitted from the Record on Appeal: -

Letter to Clerk dated 8/27/47 re filing case.

Summons and Marshal's Return thereon.

Stipulation re extension of time to answer.

Order on Stipulation.

Praecipe for subpoena.

Subpoena and Marshal's return thereon.

Memorandum Brief on Corporate Entity.

Letter dated 6/8/48 to Clerk from A. R. Kehoe.

Receipt for exhibit.

Receipt for exhibits.

Stipulations re time for filing brief.

Order extending time for Plaintiff to File Reply Brief.

Reply Brief on Corporate Entity.

Reply Brief for the Defendant.

Copy of letter from Clerk to Commerce Clearing House.

Letter to Clerk from Commerce Clearing House.

Letter to Clerk from Prentice-Hall.

Copy of letter from Clerk to Prentice-Hall.

Letter dated 3/2/49 to Clerk from A. R. Kehoe.

Notice.

It Is Further Hereby Stipulated that the Record on Appeal shall consist of the following:

Complaint.

Answer.

Pre-Trial Order.

Stipulation re facts of case.

Deposition of Roy P. Ballard.

Transcript of Proceedings.

Opinion.

Plaintiff's Objections to Defendant's Proposed Findings of Fact and Conclusions of Law.

Plaintiff's Request for Additional Findings of Fact and Conclusions of Law.

Findings of Fact and Conclusions of Law.

Judgment Order.

Notice of Appeal filed May 9, 1949.

Designation of Contentst of Record on Appeal.

Stipulation re exhibits.

Order re transmittal of original exhibits to U. S. Court of Appeals.

Cost Bond on Appeal.

Plaintiff's Exhibits 1 to 9, inclusive, and
Defendant's Exhibits A-1 to A-5, inclusive.

JONES & BRONSON.

/s/ A. R. KEHOE,

Of Counsel for Plaintiff.

/s/ THOMAS R. WINTER,

Of Counsel for Defendant.

[Endorsed]: Filed June 1, 1949.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD
ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11, as amended, of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) of the Federal Rules of Civil Procedure, as amended, I am transmitting herewith as the Record on Appeal in the above-entitled cause all of the stipulated original pleadings on file and of record in said cause in my office at Tacoma, Washington, as set forth below:

1. Complaint (1).
2. Answer (5).
3. Pre-Trial Order (7).
4. Stipulation re facts of case (7a).
5. Deposition of Roy P. Ballard (8a).
6. Transcript of Proceedings (9).
7. Opinion (15).
8. Plaintiff's Objections to Defendant's Proposed Findings of Fact and Conclusions of Law (16).
9. Plaintiff's Request for Additional Findings of Fact and Conclusions of Law (17).
10. Findings of Fact and Conclusions of Law (19).
11. Judgment Order (20).
12. Notice of Appeal filed May 9, 1949 (21).

13. Designation of Contents of Record on Appeal (22).

14. Stipulation re exhibits (23).

15. Order re transmittal of original exhibits to U. S. Court of Appeals (24).

16. Cost Bond on Appeal (25).

17. Stipulation filed June 1, 1949, re Record on Appeal (26).

I do further certify that as part of the Record on Appeal, I am transmitting herewith, pursuant to order of Court, the following original exhibits, offered in evidence in the trial of the above-entitled cause, to wit:

Plaintiff's Exhibits 1 to 9, inclusive, and

Defendant's Exhibits A-1 to A-5, inclusive and that said exhibits and the original pleadings and papers constitute the Record on Appeal from the Judgment of the said District Court, filed on April 11, 1949, and entered in the civil docket of said cause on April 11, 1949.

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington this 3rd day of June, 1949.

MILLARD P. THOMAS,

Clerk.

[Seal] /s/ EDGAR SCOFIELD,

Deputy.

[Endorsed]: No. 12259. United States Court of Appeals for the Ninth Circuit. Seattle Hardware Company, Appellant, vs. Clark Squire, Collector of Internal Revenue, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed June 6, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12259

SEATTLE HARDWARE COMPANY,
Appellant,

vs.

CLARK SQUIRE, Collector of Internal Revenue
for the District of Washington,
Appellee.

STIPULATION DESIGNATING PARTS OF
RECORD TO BE PRINTED

Whereas, Appellant and Appellee have stipulated as to the original pleadings that shall make up the Record on Appeal, and Whereas Appellant is making application to be relieved from printing or reproducing the original exhibits in the printed Transcript of Record, such application having been

served upon Appellee this 6th day of June, 1949,

Now, Therefore, the Appellant and Appellee appearing and acting by and through their respective attorneys of record herein, hereby designate the following to be included in the Transcript of Record to be printed:

1. Complaint (1).
2. Answer (5).
3. Pre-Trial Order (7).
4. Stipulation re facts of case (7a).
5. Deposition of Roy P. Ballard (8a).
6. Transcript of Proceedings (9).
7. Opinion (15).
8. Plaintiff's Objections to Defendant's Proposed Findings of Fact and Conclusions of Law (16).
9. Plaintiff's Request for Additional Findings of Fact and Conclusions of Law (17).
10. Findings of Fact and Conclusions of Law (19).
11. Judgment Order (20).
12. Notice of Appeal filed May 9, 1949 (21).
13. Designation of Contents of Record on Appeal (22).
14. Stipulation re exhibits (23).
15. Order re transmittal of original exhibits to U. S. Court of Appeals (24).
16. Cost Bond on Appeal (25).

17. Stipulation filed June 1, 1949, re Record on Appeal (26).

[Endorsed]: Filed June 7, 1949.

[Title of United States Court of Appeals.]

APPLICATION BY APPELLANT TO BE RELIEVED FROM PRINTING OR REPRODUCING THE EXHIBITS

Comes Now the Appellant, and respectfully applies to and moves the above-entitled Court for an Order relieving the Appellant from printing or reproducing the exhibits in this case in the printed Transcript of Record on Appeal, and ordering that all said exhibits be considered by this Court in their original form in determining the questions involved in this appeal, without such exhibits being so printed or reproduced, and as though they were fully set forth in said printed Transcript of Record. This application is based upon the grounds that said exhibits are voluminous, that some of them are not of a printable type, that some of the others are not easily printable, that others are bundles, such as samples of billings, that the inclusion of all of the exhibits in the printed Transcript of Record would make it extraordinarily long, and that the cost would be greatly disproportionate to the convenience of having them all so included as in all probability there will be very little need to refer to most of them. This application is supported by

the Stipulation by the parties hereto filed herewith.
JONES & BRONSON.

/s/ A. R. KEHOE,

Of Counsel for Appellant.

and

It Is Hereby Stipulated and Agreed by and between Appellant and Appellee herein, appearing and acting by and through their said respective attorneys, that all of the exhibits introduced in evidence at the trial of the above-entitled case, may be considered in their original form by the above-entitled court in determining the questions involved in this Appeal; that for the reasons stated in said application, the said parties do not consider it necessary or practical to print or otherwise reproduce said exhibits in the printed Transcript of Record on Appeal, and the parties herein respectfully request the above-entitled Court to consider each and all of the said exhibits in their original form as though the said exhibits had been printed or otherwise reproduced in the printed Transcript of Record, and further request the above-entitled Court to make and enter an Order granting Appellant's said application.

Dated: June 6, 1949.

JONES & BRONSON.

/s/ A. R. KEHOE,

Of Counsel for Appellant.

/s/ THOMAS R. WINTER.

By /s/ VAUGHN E. EVANS,

Assistant U. S. Attorney,

Of Counsel for Appellee.

ORDER

Based on the foregoing application and the stipulation of the Appellant and Appellee on file herein,

It Is Ordered that the exhibits in the above-entitled case need not be printed or reproduced in the printed Transcript of Record on Appeal, and that all of the said exhibits shall be considered in their original form by the above-entitled Court in considering and determining the questions involved in this Appeal, just as though said exhibits were set out in the printed Record.

Dated June 7, 1949.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,
United States Circuit Judges.

Due and legal service of the foregoing Application and form of Order by receipt of a duly certified copy thereof as required by law is hereby accepted in King County, Washington, on this 6th day of June, 1949.

THOMAS R. WINTER.

By /s/ VAUGHN E. EVANS,
Assistant U. S. Attorney.

[Endorsed]: Filed June 7, 1949. Paul P. O'Brien, Clerk.

In The United States Court of Appeals
For the Ninth Circuit

SEATTLE HARDWARE COMPANY, *Appellant,*

vs.

CLARK SQUIRE, Collector of Internal Revenue,
Appellee,

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

OPENING BRIEF FOR APPELLANT

H. B. JONES,

A. R. KEHOE,

R. B. HOOPER,

Attorneys for Appellant.

SEP 7 - 1949

PAUL P. O'BRIEN,
CLERK

600 Colman Building,
Seattle 4, Washington.

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In The United States Court of Appeals
For the Ninth Circuit

SEATTLE HARDWARE COMPANY,

Appellant,

vs.

CLARK SQUIRE, Collector of Internal
Revenue,

Appellee.

No. 12259

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

OPENING BRIEF FOR APPELLANT

OPINION BELOW

The Opinion of the District Court is Reported in
83 Federal Supplement 106; 49-1 U.S.T.C. Par. 9155.

JURISDICTION

This is an appeal from a judgment entered April 11, 1949, by the District Court for the Western District of Washington, Southern Division, dismissing appellant's complaint. Appellant sought recovery from the appellee, as Collector of Internal Revenue, on claims for refund of income and excess profits taxes in the amount of \$202,681.10 plus interest, for the fiscal years ending November 30, 1941 to 1945 inclusive, which taxes had been assessed against and paid by appellant to appellee (R. 36-41). The action arose under Section 24(5) of the Judicial Code, as

amended, and as qualified by Section 3722 of the Internal Revenue Code, as amended, jurisdiction having been vested in the United States District Court thereunder. The case is brought to this Court by notice of appeal filed May 9, 1949 (R. 224-225). The jurisdiction of this Court is invoked by virtue of the provisions of Title 28, United States Code, Section 1294 as amended.

STATEMENT OF THE CASE

This case involves appellant's income and excess profits tax as above stated. However, appellant's claim for 1942 was not filed within the period of limitation now held to be controlling and the parties have stipulated that it is to be eliminated from consideration. The issue of this case briefly stated is as follows: The Seattle Hardware Company in 1901 contemplated the purchase of Lots 1 and 2, Block 327, Seattle Tide Lands, for use as a plant building site. A subsidiary corporation, the Occident Trust Company, was organized to take title to the land and construct the building in its own name. The subsidiary was used to limit the liability of the parent on the construction. After the building was completed, the land and building were transferred to the parent and the subsidiary was dissolved. All these transactions took place prior to the adoption of the Sixteenth Amendment. The appellant's position is that the separate identity of the Occident Trust Company should be respected and that its basis in the land and building for gain or loss and invested capital purposes is their fair market value at the time the subsidiary was liquidated, February 21, 1906. The

appellee's position is that the separate identity of the subsidiary should be ignored and that the appellant's cost is the actual cost to the subsidiary.

STATEMENT OF FACTS

The facts, briefly stated, are as follows:

Seattle Hardware Company was organized as a corporation under the laws of the Territory and later State of Washington in 1885 and has ever since carried on a wholesale hardware business in the City of Seattle (R. 36). On April 15, 1901, there was organized a Washington corporation called the Occident Trust Company, with a capitalization of \$100,000.00, consisting of 1,000 shares of capital stock of the par value of \$100.00 each (Pl. Ex. 5). The incorporators of Occident Trust Company were Ira Bronson, who was attorney for Seattle Hardware Company, and two other individuals who were not connected with it (R. 58).

On April 15, 1901, Ira Bronson subscribed for the entire capital stock of the Occident Trust Company, and offered to convey Lots 1 and 2, Block 327, Seattle Tide Lands, to that corporation in full payment of the subscription. By unanimous vote a resolution was adopted by the trustees of the Occident Trust Company stating in part "Whereas said property is of a value of upwards of \$100,000.00 now, therefore, be it resolved that this Company accept the offer of said Ira Bronson * * *." The minutes of the meeting in which the above resolution was recorded went on to state that Ira Bronson then delivered to the company a deed of said property,

properly executed, and the President and Secretary "then and there issued and delivered to the said Bronson all the capital stock of this company." Thereupon Ira Bronson, Dana Brown and Lawrence L. Moore, the original incorporators, resigned, and M. D. Ballard, C. H. Black and F. W. Baker were duly elected to fill the vacancies caused by the resignations, and they assumed the duties of their office after subscribing the proper oath of office (Pl. Ex. 5). The latter three men were trustees and stockholders of the appellant corporation at the time they were elected trustees of the Occident Trust Company (R. 51).

Lots 1 and 2, Block 327, Seattle Tide Lands, were acquired by Ira Bronson from Stetson & Post Mill Company by deed dated April 19, 1901, for a recited consideration of \$60,000.00 (Pl. Ex. 4). Ira Bronson and his wife conveyed the property to the Occident Trust Company by a deed dated October 1, 1903 (Pl. Ex. 4).

The stock records of the Occident Trust Company could not be located (R. 52) so that the exact manner of issuance of its stock is not definitely shown, but the minutes of a special meeting of the Board of Trustees of the Seattle Hardware Company, dated September 20, 1905, show that at that time Seattle Hardware Company owned all the stock of the Occident Trust Company (Pl. Ex. 2). Seattle Hardware Company carried the stock of the Occident Trust Company on its books at that time at a value of \$120,000.00 (R. 168).

Lots 1 and 2, Block 327, which constituted the sole

asset of Occident Trust Company (R. 53) were occupied by some old buildings which required frequent repairs and produced a small amount of revenue, and the records of such transactions and the accounts of Occident were kept by the Seattle Hardware Company on an account set up on its books, the first entries of which were dated in April of 1901 (Pl. Ex. 8).

In 1904 Occident Trust Company began the construction of a seven-story and basement brick mill type building which was completed early in 1905 (R. 136) at a total cost of \$244,000.00 (R. 43). All of the building costs were handled through the Occident Trust Company account on the books of Seattle Hardware Company (Pl. Ex. 8 and 9) (R. 163 to 170).

On February 14, 1906, the Seattle Hardware Company appreciated its investment in Occident Trust Company stock by \$100,000.00 (R. 55) crediting that amount to surplus (Pl. Ex. 9). Shortly thereafter it, as the owner of all the stock of Occident Trust Company, decided to liquidate that company by taking over all of its assets (R. 55) and pursuant thereto, on February 21, 1906, it received a conveyance of title to Lots 1 and 2, Block 327, Seattle Tide Lands (Pl. Ex. 1), and transferred the book value of the stock and its account against the company to its real estate account (Pl. Ex. 9). The Occident Trust Company was thereupon left without any assets (R. 53), did no further business (R. 56), and paid no further license fees, and after three years its name was stricken from corporate rolls by the Secretary of State (Pl. Ex. 7).

On the books of the Seattle Hardware Company, after the liquidation of the Occident Trust Company, the land was recorded at the figure of \$220,000.00 and the buildings at the figure of \$244,000.00 (Pl. Ex. 9), and these amounts with proper additions and depreciation with respect to the building were thereafter used in computing equity invested capital in Seattle Hardware's income and excess profits return for 1941 (R. 43).

The return was audited by the Commissioner of Internal Revenue, resulting in an additional assessment of \$26,220.07, being assessed against Seattle Hardware Company, based on reducing equity invested capital for land account from \$220,000.00 to \$60,000.00, thereby eliminating the land appreciation that had been set up when the Occident Trust Company owned Lots (1) and (2) (R. 43). The ultimate taxes determined and paid for 1941, 1942, 1943, 1944 and 1945 were on the basis of a reduction in equity invested capital for Lots (1) and (2) to \$60,000.00 (R. 43).

In 1945, Seattle Hardware Company sold the land and buildings and as a basis for computing gain or loss, used a \$60,000 cost of Lots (1) and (2) and a \$244,000 cost of the building before taking into consideration additions to and depreciation of the building (R. 43).

On April 5, 1946, the Seattle Hardware Company filed claims for refund of income and excess profits taxes for the years 1941 through 1945, alleging that its cost basis in Lots (1) and (2) and the building before additions to and depreciation of the building

was the fair market value of the stock of the Occident Trust Company surrendered in liquidation when the land and building were transferred to it, that fair market value in turn being measured by the fair market value of the assets transferred (R. 44).

In the claims for refund appellant used a fair market value for the land of \$224,322.00 and a fair market value for the building of \$297,502.77 on February 21, 1906 (R. 44). The parties have stipulated that the fair market value of the land was \$224,322.00 and the buildings \$270,751.38 on February 21, 1906, the date the property was deeded by the Occident Trust Company to the Seattle Hardware Company (R. 44).

QUESTIONS PRESENTED

The contentions of the parties in this case are set forth in the Pre-Trial Order (R. 30-34). Briefly stated they are as follows:

The appellant contends that for purposes of determining invested capital credit in computing excess profits taxes for the fiscal years ended November 30, 1941, through November 30, 1945, and for purposes of determining gain or loss on the sale of the property in 1945 it is entitled to a cost basis for Lots (1) and (2) of \$224,322.00 and a cost basis for improvements of \$270,751.38 (before adjustments, additions and depreciation) that being the stipulated value of the assets of its subsidiary, the Occident Trust Company, on February 21, 1906, the date the subsidiary was liquidated by a transfer of all its assets to the parent.

The appellee contends that the separate identity of the subsidiary, Occident Trust Company, should be disregarded and that the cost basis of the subsidiary of \$60,000 for the land and \$244,000 for the improvements should carry over as the cost basis of the parent.

In deciding the case for the appellee, the District Court held that the Occident Trust Company was never more than a nominal holder of the property; that it was not a corporate structure acting in any sense as an independent entity; that it had an incomplete existence as a corporate structure because of the Court's determination that no stock had been issued, and that appellant was at all times the owner of the property following its acquisition by Ira Bronson in April 1901.

STATUTES

(Includes only statutes referred to but not quoted in the text)

Section 113(a) (14) I.R.C.

“(14) PROPERTY ACQUIRED BEFORE MARCH 1, 1913.—In the case of property acquired before March 1, 1913, if the basis otherwise determined under this subsection, adjusted (for the period prior to March 1, 1913) as provided in subsection (b), is less than the fair market value of the property as of March 1, 1913, then the basis for determining gain shall be such fair market value. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.”

Section 113(a) (6) I.R.C.

“(6) TAX-FREE EXCHANGES GENERALLY.—If the property was acquired after February 28, 1913, upon an exchange described in section 112 (b) to (e), inclusive, or section 112 (1), the basis (except as provided in paragraphs (15), (17), or (18) of this subsection) shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. If the property so acquired consists in part of the type of property permitted by section 112 (b) or section 112 (1) to be received without the recognition of gain or loss, and in part of other property, the basis provided in this paragraph shall be allocated between the properties (other than money) received, and for the purpose of the allocation there shall be assigned to such other property an amount equivalent to its fair market value at the date of the exchange. Where as part of the consideration to the taxpayer another party to the exchange assumed a liability of the taxpayer or acquired from the taxpayer property subject to a liability, such assumption or acquisition (in the amount of the liability) shall, for the purposes of this paragraph, be considered as money received by the taxpayer upon the exchange. This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it.”

Section 113(a) (15) I.R.C.

“(15) PROPERTY RECEIVED BY A CORPORATION ON COMPLETE LIQUIDATION OF ANOTHER.—If the property was received by a corporation upon a distribution in complete liquidation of another corporation within the meaning of section 112 (b) (6), then the basis shall be the same as it would be in the hands of the transferor. The basis of property with respect to which election has been made in pursuance of the last sentence of section 113 (a) (15) of the Revenue Act of 1936, as amended, shall, in the hands of the corporation making such election, be the basis prescribed in the Revenue Act of 1934, as amended.”

STATEMENT OF POINTS TO BE URGED

The appellant is entitled to a cost basis for Lots (1) and (2) of \$224,322.00, and for improvements thereon of \$270,751.38, subject to adjustments, additions and depreciation, and such cost basis controls for gain or loss and invested capital purposes, and appellant's claims for refund for all years here involved, except the fiscal year ending November 30, 1942, should be allowed to that extent.

ARGUMENT

I. The Question of Separate Entity.

A. Was the organization of Occident Trust Company Complete?

The District Court erred in determining that the Occident Trust Company had an incomplete existence because no stock was issued (R. 215, 216).

In the first place, the evidence was sufficient to establish that stock was issued. The minutes of the meetings of the trustees of the Occident Trust Company state that stock was issued and held by Seattle Hardware Company (Pl. Ex. 2). Mr. Wills, who was a trustee of Seattle Hardware Company beginning in 1905 (R. 119) testified he positively recalled seeing the stock (R. 120) and testified that while the stock was issued in the names of various stockholders of the Seattle Hardware Company (R. 120) it was beneficially owned by the Seattle Hardware Company (R. 120).

But in any event, the organization of the Occident Trust Company was complete regardless of the issuance or non-issuance of capital stock. It is rather obvious in this case that while Ira Bronson purchased Lots (1) and (2), organized the Occident Trust Company, and turned the lots in to the company for the capital stock of the company, he was acting as agent of the Seattle Hardware Company, and the Seattle Hardware Company initially furnished the \$60,000.00 purchase price for the lots. The District Court so found (R. 186).

The minute book of the Occident Trust Company (Pl. Ex. 5) shows that its articles were filed, trustees were elected, and qualified, by-laws were adopted, the entire capital stock was subscribed, paid for, and allotted. The general corporation laws in effect at the time the Occident Trust Company was organized in 1901 were those contained in Chapter 185 of the Code of Washington, adopted in 1881 (Code of Wash-

ington 1881, page 416). Section 2424 of that Code provided that "when the certificate of incorporation" was "filed the persons who have signed the certificate" of incorporation and their successors "shall be a body corporate and politic in fact and in name, by the name stated in their certificate * * *." Chapter 116 of the Washington Session Laws of 1891 amended the above Code to provide "that no such corporation shall commence business * * * until the whole amount of its capital stock has been subscribed." The Occident Trust Company was a complete corporation under Washington law, regardless of whether stock certificates were actually issued.

Section 5094 of Chapter 58 of Fletcher's *Cyclopedia of the Law of Private Corporations*, Volume 11, page 64, indicates "that a certificate of stock is not the stock itself, but merely the written evidence of the stockholder's rights as such. It is a necessary conclusion therefrom that issuance of a certificate of stock is not necessary to make one a stockholder. And it is well settled, as a general rule of corporation law that, in the absence of statutory or charter provision or agreement to the contrary, a subscriber for stock in a corporation, * * * becomes a stockholder as soon as his subscription is accepted by the corporation, and statutory or charter conditions are performed or fulfilled, or as soon as the purchase is completed, as the case may be, whether a certificate of stock is issued to him or not; and, although he may have no certificate, he is thereupon entitled to all the rights."

It follows that even if no stock certificates were issued, since Ira Bronson was agent of the Seattle

Hardware Company, as the District Court determined (R. 186) the Seattle Hardware Company became the sole stockholder of the Occident Trust Company and properly operated the Occident Trust Company through trustees who were likewise officers and trustees of the Seattle Hardware Company.

B. Should the separate identity of Occident Trust Company be respected?

The District Court erred in holding that the Occident Trust Company was not a corporate structure acting in any sense as an independent entity; and that it never was more than an instrumentality created by taxpayer temporarily to hold title for taxpayer, and nothing more. This issue of when a subsidiary's separate identity will be respected or disregarded, has a wealth of case law to resolve it, especially tax cases, which establish that if the subsidiary is formed and operated for business purposes, its separate identity will be recognized even though it has substantial identity, in practical operation, with its parent. If a subsidiary is simply a sham or acting merely as an agent for its stockholders without a business purpose or for tax avoidance, its separate identity will be disregarded.

Of course there is no tax avoidance involved here as the entire transaction took place seven years prior to the time the income tax law was adopted.

What does the evidence show as to the reason for organizing the Occident Trust Company, transferring the property to it, having it construct the building, and not taking the property into the Seattle

Hardware Company until February 21, 1906? The evidence is as follows: Mr. Ira Bronson purchased the lots from Stetson & Post Mill Company on April 19th of 1901. The consideration was \$60,000. While probably the Seattle Hardware Company had furnished the \$60,000, for the sake of accuracy, it should be pointed out there is no direct evidence that such was the case.

Even if Seattle Hardware Company did advance the money for the purchase of the lots, at the time of the purchase it did not have and did not want to take legal title in its own name. On the contrary, it deliberately planned to avoid the responsibility of ownership. Occident Trust Company was organized prior to the acquisition of the lots by Ira Bronson (Pl. Ex. 5) and transfer of title ran directly from Stetson & Post Mill Company to Ira Bronson (Pl. Ex. 4).

Ira Bronson subscribed for all of the stock of the Occident Trust Company and offered to convey the legal title to Lots (1) and (2) to the Occident Trust Company in satisfaction of his subscription (Pl. Ex. 5). Acceptance of the offer was authorized by the Board of Directors of the Occident Trust Company (Pl. Ex. 5). While legal title was not actually transferred from Ira Bronson to the Occident Trust Company until October 1, 1903 (Pl. Ex. 4), it is clear that Occident Trust Company was the real owner of the property from and after its acceptance of his offer. The Seattle Hardware Company never had legal title to the lots until they were transferred to it by the Occident Trust Company on February 21, 1906 (Pl. Ex. 1).

The evidence is positive that the ownership of the lots and the construction of the building were deliberately divorced from the Seattle Hardware Company for business reasons. Mr. Ballard testified on direct examination (R. 50 and 51):

“Q. What was the occasion for forming that company? (Referring to the Occident Trust Company.)

A. We formed that company to act as a holding company, real estate holding company, in order that we might not have to spoil the looks of our financial statement by the borrowing that it would be necessary to do in buying the property and building the building.

Q. Do you recall whether there were any other reasons for forming the company besides what you have just mentioned?

A. Not that I know of.

Q. Was there any discussion or consideration of the matter of risk of liability for claims in connection with building construction?

A. Claims against the company, you mean?

Q. That might arise in connection with construction.

A. Well, that again was just considered the same thing; in other words, we protected the Seattle Hardware Company as a hardware store against undue financial risk.”

In his redirect examination he testified (R. 68 and 69):

“Q. You said in answer to Mr. Miller’s question that in fact, the holding of the property was to be merely temporary and that it was to be trans-

ferred back to the Seattle Hardware Company at some time. What I would like to know is what specific discussion or consideration can you now recall on that subject?

A. None, other than the fact that that was a land company or real estate holding company, and, as I said before, was not to be confused in any way with the operation of the Seattle Hardware Company. The Seattle Hardware Company was incorporated as a hardware store, and as soon as it took title to the property and there was no longer any confusion as to construction or real estate matters, then the Occident Trust Company would cease to function and the Seattle Hardware Company would carry on."

The testimony of Mr. Charles S. Wills was to the same effect. In his direct examination he testified (R. 123 and 124):

"Q. What had been the purpose or function of the Occident Trust Company?

A. To build this building on the land that they had acquired, and to make the contracts in the name of the Occident Trust Company, and do all those things that would avoid the responsibility or legal liability of the parent company.

Q. And what were the reasons why they—well, I guess you have stated the reasons why it was a separate company.

A. One other reason was, they had—had to borrow money, and that was an obligation of the Occident Trust Company, and it relieved the Se-

attle Hardware Company from that much bills payable.

Q. Were you with the company at the time that that mortgage was given, do you recall?

A. Well, that I can't recall, but I do recall many times going to the Thomas Investment Company to make an installment of interest.

Q. This will be shown in evidence a little later, that under date of September 21st, 1905, the Occident Trust Company issued a mortgage to Travelers' Insurance Company for a hundred fifty thousand dollars. Were you with the Seattle — —

A. I was.

Q. Is this one of the circumstances that you refer to, is it?

A. Yes."

On cross-examination Mr. Wills further testified (R. 136):

"A. Well, the Seattle Hardware Company was a trading concern, engaged in merchandising, and this was another venture, building a building, and it involved considerable liabilities and responsibilities and they thought the best way to—to overcome that was to have a separate corporation to do the work, to complete it, and to borrow money for its completion.

Q. Borrow it in the name of this separate corporation?

A. Occident—yes, Occident Trust Company."

And later (R. 141):

"Q. Well, then, the only activities that you

know of that the Occident Company performed, it held the title to this property and during the time that the building was constructed.

A. They not only owned—held the title, they owned the property and they built the building and borrowed the money to complete the building.”

The evidence shows that during the course of construction of the building, the identity of Occident Trust Company as owner was carefully preserved. The contractor's bond of Donaldson Bros. ran to the Occident Trust Company; the contractor's bond of H. W. Hawley ran to the Occident Trust Company; the contractor's bond of Ernest Carstens ran to the Occident Trust Company; the contractor's bond of Soderberg and Hill ran to the Occident Trust Company. Invoices of H. W. Hawley, F. M. McLellan, T. E. Jones, Washington Steam Heating Co., D. E. Fryer & Company, Washington Iron Works Co., George W. Church, Soderberg & Hill and Index Granite Works all ran to the Occident Trust Company (Pl. Ex. 3). Invoices of Pacific Wire & Plating Works and Z. C. Miles & Piper Co. ran to the Seattle Hardware Company, but these were changed by A. Wickersham, Architect, to the Occident Trust Company (R. 143).

It is clear that the Occident Trust Company was formed and used for a business purpose, and engaged in business activity on its own account. It was formed and proceeded to take title to the real estate and construct a building on it, for the perfectly legitimate purpose of relieving Seattle Hardware Company of

liability and responsibility on financing and construction risks. The situation calls for recognition of the separate entity under the applicable decisions.

Brief reference will be made to Washington state and Ninth Circuit decisions where disregard of separate corporate identity in other than tax cases is discussed, but the main authorities will be tax decisions.

To the extent that the matter is governed by State Law, under *Erie Railroad Co. v. Tomkins*, 304 U.S. 64, 82 L. ed. 1188, 58 S. Ct. 817, it is fully disposed of by *Pittsburgh Reflector Company v. Dwyer & Rhodes Co., Inc.*, 173 Wash. 552, where the general rule is set forth as follows (pp. 554, 555):

“Mere common ownership of the capital stock, interlocking directorates, or like evidences of close association, will not justify the courts in disregarding corporate identities. *Associated Oil Co. v. Sieberling Rubber Co.*, 172 Wash. 204, 19 P.(2d) 940, and cases there cited.

“In order to justify the judicial disregard of corporate identities, one, at least, of two things must clearly appear. Either the dominant corporation must control and use the other as a mere tool or instrument in carrying out its own plans and purposes so that justice requires that it be held liable for the results, or there must be such a confusion of identities and acts as to work a fraud upon third persons. In most, if not all, of the Washington decisions in which corporate entities have been disregarded, both elements have appeared, and there is strong authority for the rule that both elements (if there be

two) must appear to warrant relief." (Citing cases)

Similar pronouncements outside of the tax field have been made by the Court of Appeals for this Ninth Circuit, of which we refer only to the following as typical:

Exchange National Bank of Spokane v. Meikle, 61 F.(2d) 176, involved a suit by a trustee in bankruptcy to recover a preference, which turned upon the construction to be placed upon the financial relationship between the sole stockholder and the corporation. The court said (p. 179):

"The manner in which Herrick business enterprises were carried on shows a complete disregard of corporate organization and identity, not only with regard to the corporations chartered in the same state, but also with regard to corporations chartered in different states. It is not difficult to see Herrick as the prime mover of all the various companies, but the rule is well established that a corporation exists as an entity, and that courts of law will not go beyond the facts of corporate existence in order to examine the real ownership of a corporation."

This was followed by a number of citations emphasizing that the corporation and its shareholders are to be treated as distinct legal persons even where all of the stock is owned by a single shareholder.

The earlier case of *Finn v. George T. Mickle Lumber Co. of Oregon* (C.C.A. 9) 41 F.(2d) 676, and the later case of *Gillis v. Jenkins Petroleum Process Co.* (C.C.A. 9) 84 F.(2d) 74 are to the same effect.

The case of *Haskell v. McClintick-Marshall Co.*

(C.C.A. 9) 289 Fed. 405, is especially apropos in view of its striking similarity to the present case. There the parent organized a subsidiary to construct a building for the parent. Lien claimants asserted liability against the parent on the theory that the subsidiary was merely an agency or instrumentality of the parent. This court said at page 413:

“The contention that the building company is a mere agency or instrumentality of the bank, and that the lien claimants are entitled to a decree against the bank as well as against the building company, cannot be sustained. It is by no means uncommon for the officers of a bank to form a building company, to furnish quarters for the bank and for other purposes. Nor is it uncommon for the two corporations to have substantially the same officers and stockholders. But mere identity of officers and stockholders is of little moment.” (Citing cases)

Turning now to the tax cases, consideration will be limited to decisions of the United States Supreme Court and of the Courts of Appeals for the Ninth and Second Circuits. We refer to decisions of the Second Circuit for the reason that the Second and Ninth Circuits at first took divergent positions on the recognition of the identity of a subsidiary or controlled corporation, the divergence stemming from the same Supreme Court decision, but later the Second Circuit came around to the position of the Ninth Circuit; and for the further reason that appellee has indicated he will depend on Second Circuit decisions to support his position (R. 103).

The Supreme Court case on which the Second and Ninth Circuits diverged was that of *Higgins v. Smith*, 308 U.S. 473, 60 S. Ct. 355, 84 L. ed. 406. The point of the decision that gave rise to the divergence is contained in Mr. Justice Reed's statement for the majority as follows:

"A taxpayer is free to adopt such organization for his affairs as he may choose and having elected to do some business as a corporation, he must accept the tax disadvantages.

"On the other hand, the Government may not be required to acquiesce in the taxpayer's election of that form for doing business which is most advantageous to him. The Government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purpose of the tax statute."

The case that brought the Second Circuit around to the position of the Ninth Circuit was that of *Moline Properties, Inc. v. Commissioner*, 319 U.S. 436, 63 S. Ct. 1132, 87 L. ed. 1499. This case will be discussed in detail because it is a landmark case on recognition or non-recognition of separate corporate entity.

In this case the corporation, Moline Properties, had sought to have its separate corporate entity disregarded and to have its gains on sales of its real property taxed to the sole stockholder, the corporation thus taking the position of the appellee in the present case. The Board of Tax Appeals had agreed

with the corporation, but its decision was reversed by the Fifth Circuit. The facts were these:

Thompson, the sole stockholder, formed Moline in 1928 at the suggestion of the mortgagee of certain of his property in order to enable him to use the stock which he received for his equity as security for additional loans. This special purpose for the corporate form was fully accomplished in 1933 at which time the mortgage loan was refinanced and in the language of the Supreme Court "control of petitioner reverted to Mr. Thompson." From then on the corporation form could have been ignored. The corporation, however, continued to hold the property, and sales were made in 1934, 1935 and 1936, the proceeds of which were received by Thompson, the sole stockholder, and deposited in his bank account. It was the gain on the sales in 1935 and 1936 that was involved in this case.

Up until 1933 the business done by the corporation had consisted of the assumption of certain obligations of Thompson, the sole stockholder, the defense of certain condemnation proceedings, and the institution of a suit to remove restrictions imposed on the property by a prior deed, the expenses of which action were paid by Thompson. In 1934 it leased a portion of its property for use as a parking lot for a rental of \$1,000.00. It kept no books and maintained no bank account during its existence and owned no other property.

The Board of Tax Appeals held that the gain should be taxed to the individual stockholder on the ground that the corporation was nothing more than an agent for Thompson (45 B.T.A. 647), but the

Court of Appeals reversed, holding that the corporate entity should be recognized (131 F.(2d) 388).

On this situation the Supreme Court said (p. 438) :

“The doctrine of corporate entity fills a useful purpose in business life. Whether the purpose be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator’s personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity.” (Citing cases)

After referring to various previous decisions in in which different results were reached under special circumstances which the court recognized as “exceptions but held to lay down no rule for tax purposes” it said (p. 440) :

“When petitioner discharged its mortgages held by the initial creditor, and Thompson came into control in 1933, it was not dissolved, but continued its existence, ready again to serve his business interests. It again mortgaged its property, discharged that new mortgage, sold portions of its property in 1934 and 1935 and filed income tax returns showing these transactions. In 1934 petitioner engaged in an unambiguous business venture of its own—it leased a part of its property as a parking lot, received a substantial rental. The facts, it seems to us, compel the conclusion that the taxpayer had a tax identity separate from its stockholder.

“Petitioner advances what we think is basically the same argument of identity in a differen

form. It urges that it is a mere agent for its sole stockholder and 'therefore the same tax consequences follow as in the case of any corporate agent or fiduciary.' There was no actual contract of agency nor the usual incidents of an agency relationship. Surely the mere fact of the existence of a corporation with one or several stockholders, regardless of the corporation's business activities, does not make the corporation the agent of its stockholders. Therefore the question of agency or not depends upon the same legal issues as does the question of identity previously discussed."

The *Moline Properties* case and preceding Supreme Court cases and the change of position of the Second Circuit are well discussed in two recent cases decided by the Second Circuit, *National Investors Corporation v. Hoey*, 144 F.(2d) 466, and *Commissioner v. National Carbide Co.*, 167 F.(2d) 304. An analysis of these cases and a comparison of them with the Ninth Circuit case of *Commissioner of Internal Revenue v. Laughton*, 113 F.(2d) 103, will demonstrate that the Second Circuit had broadened the conditions under which the government could disregard corporate entity in tax cases and then had to reverse itself and narrow the conditons to a situation where the corporate form was "unreal or a sham" and only for tax saving, with no real business purpose present, the new position being taken to conform with the Supreme Court's decision in the *Moline Properties* case. On the other hand, the Ninth Circuit in the *Laughton* case, referring to the case of *Higgins v. Smith*, the key case on which the positions of the

Ninth and Second Circuits diverged said (113 F. (2d) p. 104):

“It is arguable that the Higgins decision means that no matter what the particular ‘tax event’ may be, if it be more profitable to the tax collector to disregard the intervening corporate entity this must be done. However, it seems to us that if this were the intent of the court it would have said so and not spread its consideration of the cases over many pages of the opinion with such qualifying language as is quoted above.

“We take the opinion to mean that the ‘tax event’ is not an unreal attempt to use a corporation for a sham transaction, procuring an advantageous tax consequence to the taxpayer, if it may be considered as one primarily for an independent business purpose and not a transfer of assets (here Laughton’s services), with a retention of their control, solely to reduce tax liability.”

In other words, the *Moline Properties* case vindicated the Ninth Circuit’s interpretation of the *Higgins* case as stated in the *Laughton* case, and the Second Circuit reversed itself in the *National Investors* and *National Carbide* cases to put itself in line with the position of the Ninth Circuit.

The *National Investors* case involved these facts: On December 17, 1934, the taxpayer transferred its holdings in three subsidiaries worth \$4,660,000 to a fourth subsidiary for all its stock consisting of 10 shares. This was done as preliminary to a plan to unite the taxpayer and its four subsidiaries into one company. This plan was submitted to the stock-

holders on December 20, 1934, but after extended consideration the plan was rejected by the stockholders. The taxpayer then decided to liquidate the fourth subsidiary to which its holdings had been transferred. On December 21, 1935, it turned in one-tenth of the stock for one-tenth of the assets, claiming a loss of \$230,000 which was all it could use for tax purposes in 1935. In January, 1936, it completed the liquidation, claiming a further loss, resulting from depreciation in value during 1935 of the securities which were originally transferred and then taken back.

Judge Hand discussed at some length when the corporate form may be disregarded (144 F.(2d) 467 and 468). He first pointed out that originally the Second Circuit, when *Higgins v. Smith* was before it, had assumed that the general rule applied and had allowed the loss:

“In this we were in error, however, for the Supreme Court held that, although the Treasury might insist upon the separate personality of the corporation when it chose, it might also disregard it, when it chose.”

He then pointed out that in *United States v. Morris & Essex R. Co.*, 135 F.(2d) 711, the Second Circuit had interpreted the Supreme Court decision in *Higgins v. Smith* to mean that:

“The Treasury may take a taxpayer at his word, so to say; when that serves its purpose, it may treat the corporation as a separate person from himself, but that is a rule which works only in the Treasury’s own favor; it cannot be used to deplete the revenue.”

But as to this interpretation, Judge Hand then went on to say in the *National Investors* case:

“Again we were wrong; we neglected to observe that the corporate ‘form’ must be ‘unreal or a sham’ before the Treasury may disregard it; we had taken too literally the concluding language that it was the ‘command of income and its benefits which marks the real owner of property’.”

This he says, was made evident by the Supreme Court’s decision in the *Moline Properties* case, as to which he states:

“The gloss then put upon *Higgins v. Smith*, supra, was deliberate and is authoritative; It was, that, whatever the purpose of organizing the corporation ‘so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity’.”

Applying these principles to the case before it, the court held that the fourth subsidiary was properly organized for business purposes for the purpose of putting through the plan of consolidation. However, as soon as that plan was rejected by the stockholders and abandoned, any continued retention of the securities in the subsidiary was not a “business” activity. The court therefore held that the taxpayer was entitled to deduct as a loss any decrease in the value of the securities until the shareholders rejected the plan and for a reasonable time thereafter but that it was not entitled to deduct any depreciation in value after such time when there was

no longer any "business" for the subsidiary to do. That later decreases in value should not be recognized was regarded as the inevitable corollary of the doctrine that the Treasury may disregard transactions with a wholly-owned corporation not engaged in any business activity.

The *National Carbide* case involved these facts:

The parent owned all of the shares of several taxpayer subsidiaries which were formed and used to carry on separate branches of the parent's manufacturing business under a contract designating the subsidiary as agent of the parent. The latter supplied all of the working capital to the subsidiary, provided it with executive management, office accommodations, and other facilities necessary to its operation, furnished and paid for all of the assets held or used by the subsidiary, had the same officers and directors who met only, so far as the subsidiary was concerned, to formally ratify what had already been done by the parent, and maintained control and directed all of the activities of both parent and the subsidiary from one general main office in New York. Here certainly was a situation which allowed for the greatest leeway in disregarding corporate entity, and the court took occasion to review at considerable length the various decisions of the Supreme Court leading up to *Moline Properties, Inc., v. Commissioner*, which it regarded as the final and determinative direction on the subject.

The court (167 F.(2d) 306, 307) observed that in *Moline Properties* the Supreme Court had recog-

nized that there were occasions on which the formal existence of the subsidiary should be disregarded, but that such exceptions were limited to cases where "the corporate form * * * is a sham or unreal" and it concluded further that what the Supreme Court meant by this language was that the subsidiary was a "sham when it was not created or used for some business purpose, but as a screen for another corporation which, or an individual who, was conducting the business." Following this thought the court said that "it is not the presence of an accompanying motive to escape taxation that is ever decisive, but the absence of any motive which brings the corporation within the group of those enterprises which the word ordinarily includes." Proceeding then to the facts of the particular case and the reasons for the parent forming and acting through the subsidiary, it said: "Whatever its reasons, they were business reasons, and the corporations it used were 'corporations' within any interpretation of law. That is enough; it must accept the consequences of that choice, and it is not material that it retained the direction of their affairs down to the minutest detail, that it provided them with their assets, that it stood back of their liabilities and took all of their profits."

The court then went on to reverse the decision of the Tax Court which had set aside income tax deficiencies of the three corporations for the year 1938 on the ground that the income was that of the parent corporation as principal.

In *Rogan v. Starr Piano Company*, 139 F.(2d) 671, the Ninth Circuit reiterated its position as stated

in the *Laughton* case, and the case is especially significant here because of its factual similarity to the instant case. It involved two corporations: one, the Starr Piano Company, the appellee of the case; the other, Gennett, a corporation wholly owned by the Starr Piano Company. The facts as stated by the court were as follows (pp. 672, 673):

“On February 1, 1921, Clara Howes Mackey leased to appellee for a term of 99 years certain real property in Los Angeles, California. On March 1, 1921, Arthur N. Pelton leased to appellee for a term of 99 years other real property in Los Angeles. In May, 1922, appellee caused Gennett to be organized for the purpose of holding legal title to the leases. On July 17, 1922, appellee transferred the leases to Gennett in exchange for all of Gennett’s capital stock. At all times during Gennett’s existence appellee owned all of Gennett’s outstanding stock. On August 1, 1922, Gennett sub-leased the Mackey and Pelton properties to appellee for a term of 15 years ending July 21, 1937. In 1922 Gennett issued bonds in the sum of \$200,000 and, with the proceeds thereof, constructed a building on the Pelton property. On July 1, 1923, appellee and Gennett sub-leased the Pelton property to Bullock’s, a California corporation, for a term of 25 years ending June 30, 1948. On May 1, 1924, that term was extended to April 30, 1984. On May 1, 1924, appellee and Gennett sub-leased the Mackey property to Bullock’s for a term of 60 years ending April 30, 1984. Gennett’s officers and directors were employees of appellee. Gennett had no office separate and apart from appellee, had no assets except the leases, had no bank account and had no employees except its

officers and directors. Its bookkeeping was done by an employee of appellee. Its debts were paid by appellee, and such payments were credited to appellee on Gennett's books. All rentals accruing to Gennett under the sub-leases were collected by a bank as trustee for Gennett and were applied by the bank to the retirement of Gennett's bonds and to the payment of interest thereon and taxes on the leased properties. For the years 1922, 1923 and 1924, appellee and Gennett filed separate income tax returns. For the years 1925 to 1933, inclusive, they filed consolidated returns. In 1934, prior to the merger, appellee transferred certain accounts to Gennett, to be collected in the name of Gennett. Some of the accounts were so collected. The others were transferred back to appellee. Gennett carried on no activities except hereinabove set forth."

The decision goes on to state (p. 674):

"Appellee asks us to disregard the fact that, prior to the merger, appellee and Gennett were separate entities. The trial court thought that this should be done. We do not think so. The following language, used in *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 442, 54 S. Ct. 788, 791, 78 L. ed. 1348, is applicable here:

" 'as a general rule a corporation and its stock holders are deemed separate entities and this is true in respect of tax problems. Of course, the rule is subject to the qualification that the separate identity may be disregarded in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private rights. But in this case we find no exceptional situation—nothing taking it out

of the general rule. On the contrary, we think it a typical case for the application of that rule'."

The Supreme Court has reiterated the rule of the *Moline Properties* case as recently as March of this year. The *National Carbide* case previously discussed was appealed and the Supreme Court affirmed the decision of the Second Circuit. (See *National Carbide Corporation v. Commissioner*, U.S. Sup. Ct. Law. ed. Advance Opinion, Vol. 93, No. 11, p. 634.)

Chief Justice Vinson wrote the opinion and covered the point as follows (p. 639):

"The theory upon which the Tax Court expunged the deficiencies apparently was that since the *Southern Pacific Co.* case was not expressly overruled by *Moline Properties*, the 'business purpose' rule laid down in the latter is not absolute, but that the corporate entity may be disregarded (or the corporation treated as an agent of its owner) for tax purposes when the facts of ownership and control of the corporation approximate those presented by the *Southern Pacific* case. The Court of Appeals disagreed. It held that under our decisions, when a corporation carries on business activity the fact that the owner retains direction of its affairs down to the minutest detail, provides all of its assets and takes all of its profits can make no difference tax-wise. The court concluded that 'Even though *Southern Pacific Co. v. Lowe*, *supra*, set up a different test, we regard it as pro tanto no longer controlling.'

"The result reached by the Court of Appeals is clearly required by our later decisions."

We submit that the District Court was in error in

deciding the instant case on the basis that the separate identity of the Occident Trust Company should be ignored.

II. Basis for Loss on the 1945 Sale.

The District Court decided this case on the preliminary point of whether or not the separate identity of the Occident Trust Company should be recognized (R. 191, 220). It did not get to the question of basis for determining loss on the 1945 sale or the question of the appellant's invested capital credit for excess profits tax computation for the years 1941 through 1945, if the separate identity of the Occident Trust Company was to be respected. It is appellant's position that for gain or loss purposes its cost in Lots (1) and (2) and the building, before additions to and depreciation of the building, was the fair market value of the stock of the Occident Trust Company surrendered when the land and building were transferred to it, that fair market value in turn being measured by the fair market value of the assets transferred. The fair market value of the land, as stipulated, was \$224,322.00, and the building \$270,751.38 at the time of the transfer. On this point the cases have uniformly held that where stock is turned over for property, cost is the value of the stock which, in turn, if closely held, is equivalent to the fair market value of the property received. In the case of *Reliance Investment Co.*, 22 B.T.A. 1287, the Board said at page 1289:

"The petitioner in 1925, 1926 and 1927, sold property which it had in 1914 acquired in exchange for all its stock. The respondent computed the gain from these sales upon the basis of the

cost to petitioner in 1914. The cost was taken to be the value of petitioner's stock when issued for the property, and such value was taken as the equivalent of the stipulated value of the property received. This is the long accepted way of determining such cost. *William Ziegler, Jr.*, 1 B.T.A. 186; *Mead Realty Co.*, 21 B.T.A. 1062."

In the case of *William Ziegler, Jr.*, 1 B.T.A. 186, at page 192, the Board said:

"The usual method of appraising stock issued for property where there is no evidence of the market value of the stock is to say that the stock is deemed equivalent in value to the property for which it was issued, and by determining the value of the property, one can determine the value of the stock."

In presenting the statutory provisions for determining gain or loss, brief reference will be made to the sections covering tax free liquidation of a subsidiary, even though they are not applicable in this case, first of all because the appellee has indicated he will assert their applicability and secondly because some reference to them will make it easier for this court to follow discussion of these provisions in cases hereinafter cited and discussed.

The statutory provisions for determining the amount of gain or loss are found in Section 111, I.R.C., those prescribing the extent to which gain or loss shall be recognized are in Section 112, and those for determining the basis of property sold or exchanged are in Section 113. Section 111 provides in part as follows:

"(a) The gain from the sale or other disposi-

tion of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized."

Section 113(b) provides in part as follows:

"(b) Adjusted Basis—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided." (There follows provision for depreciation, depletion, etc.)

Section 113(a) provides in part as follows:

"(a) Basis (Unadjusted) of Property—The basis of property shall be the cost of such property; except that * * *."

This is followed by twenty-two exceptions to this stated rule, none of which are applicable to basis for determining *loss* on property acquired before March 1, 1913.

Section 113(a) (14) provides an exception in basis for determining *gain* on property acquired before March 1, 1913, but it is silent as to basis for determining *loss* on property acquired before March 1, 1913, and the Commissioner's regulations (Regulations 111, sec. 29.113(a)(14)-1) explicitly recognize that fact.

The provisions of the Internal Revenue Code covering the tax free liquidation of a subsidiary are

Section 113(a) (6), Section 113(a) (15) and Section 112(b) (6).

Section 113(a) (6) provides that if property was acquired after February 28, 1913, upon an exchange described in Section 112(b) to (e), the basis, *except as provided in paragraphs (15), (17) or (18) of this sub-section*, of the transferee shall be the same as that of the transferor.

Section 113(a) (15), *one of the exceptions to Section 113(a) (6) above*, provides, with certain exceptions of no importance here, that where property is received by a corporation in complete liquidation of another corporation within the meaning of Section 112(b) (6), then the basis shall be the same as in the hands of the transferor.

Section 112(b) (6) provides that: "No gain or loss shall be recognized upon the receipt by a corporation of property distributed in complete liquidation of another corporation."

The provisions of 112(b) (6) under which no gain or loss is recognized upon the receipt by a corporation of property distributed in complete liquidation of another corporation and 113(a) (15) that the basis of the transferee is that of the transferor first appeared in the Revenue Act of 1936 and that Act by its own terms applied only to taxable years beginning after December 31, 1935. (Section 1003 of the Revenue Act of 1936 provided: "Except as otherwise provided, this Act shall take effect upon its enactment. Approved, June 22, 1936, 9 P.M.")

This was pointed out in *Commissioner v. Stimson Mill Co.* (C.C.A. 9) 137 F.(2d) 286.

Prior to the Revenue Act of 1936 the liquidation of a subsidiary was a transaction on which gain or loss was recognized the same as in any other case of liquidation and the basis of the parent in the assets received was cost; such cost being the fair market value of the assets received from the subsidiary in exchange for surrender of the stock of the subsidiary at the time of liquidation. (See Merten's Law of Federal Income Taxation, Vol. 1, Section 9.86, p. 559).

The following cases cover the situation from the time the income tax laws first went into effect, March 1, 1913, to the effective date of the Revenue Act of 1936. They are presented somewhat in detail not only to show that the liquidation of a subsidiary prior to 1936 was a taxable transaction giving rise to a new basis, but also to show that the courts have treated similar transactions (of the kind involved in the instant case) as appellant contends the 1906 transaction should be treated in the instant case. This is followed by a presentation of cases showing that transactions of this kind occurring prior to March 1, 1913 are afforded the same treatment as those occurring between 1913 and 1936.

Frelmort Realty Corporation, 29 B.T.A. 181, involved a 1925 transfer of assets from a subsidiary to the parent. The Board said at pages 189 and 190:

“In the cases we have here, the evidence leaves no doubt that it was the intent of the parties interested in Brown-Rochester to wind up its business. It had been formed for a particular

purpose—to hold title to certain real estate—and upon disposition of the property there was obviously no further need for the corporation to exist as a separate entity. Consequently those in control decided to liquidate it, and upon distribution of its assets to petitioner the liquidation was an accomplished fact. The fact that petitioner continued to hold the stock of Brown-Rochester and the latter has not been formally dissolved is no obstacle to the transfer being a distribution in liquidation.

* * * * *

“It is well settled that the transfer, in liquidation, of a subsidiary’s assets to the parent may result in gain or loss to the parent. *Riggs Natl. Bank*, 17 B.T.A. 615, affd. 57 F.(2d) 980; *Canal-Commercial Natl. Bank*, 22 B.T.A. 541, affd. 63 F.(2d) 619. We hold that petitioner acquired the assets of Brown-Rochester in liquidation, and the tax should be computed accordingly.”

France Co. v. Commissioner (C.C.A. 6) 88 F.(2d) 917, involved a 1929 liquidation. That court said at page 918:

“It cannot be doubted that these transactions effected a complete liquidation of Bascom. Such was their purpose. Therefore the assets which were distributed to the petitioner, the sole stockholder, must be treated in full payment for the 400 shares of Bascom stock which were delivered in exchange therefor.”

Pierce Oil Corporation, 32 B.T.A. 403, involved a 1918 liquidation. The Board said at page 431:

“When, however, *Pierce Fordyce* was, in 1918, completely liquidated, albeit not formally dis-

solved, and Pierce Oil, as its shareholder, received its assets in lieu of its certificates, this gave rise to gain or loss measured by the difference between the investment in the certificates and the actual value of the liquidated assets.”
(Citing cases)

Vonnegnt Hardware Co., 28 B.T.A. 784, involved a 1925 liquidation. The Board said at page 786 and 787:

“It seems clear that this transaction—the purchase of the stock of the Lilly Co., immediately followed by liquidation and distribution of the corporate assets—is one upon which gain or loss is to be recognized. * * *

“While it is true that the Lilly Co. was not immediately dissolved, that fact did not prevent its liquidation, for after its stock was purchased by petitioner, its regular business terminated and its existence was continued for the restricted necessity of proceedings for the collection of its outstanding accounts. *Fred T. Wood*, 27 B.T.A. 162, and cases there cited.”

American Printing Co., 27 B.T.A. 1270, involved a 1917 liquidation. The Board said at page 1279:

“Under the transactions described in our findings of fact, the American Printing Company acquired all the assets of its subsidiary the Fall River Company, on December 31, 1917, in liquidation and thereby realized a profit on the disposition of its stock. * * * The cost to the American Printing Company of the assets thus acquired from the Fall River Company, therefore, was their fair market value as of December 31, 1917. This cost, then, became the basis for determining gain or loss on the sale of such assets, and the basis for

computing depreciation and valuing the opening inventory for 1918.”

Does the fact that the exchange of stock for property in the instant case took place prior to March 1, 1913, the effective date of the income tax, make any difference as far as basis for gain or loss is concerned? The cases hold not.

Regal Shoe Co., 1 B.T.A. 896, involved a Maine corporation organized on January 17, 1907. On January 18, 1907, it issued common stock of \$2,499,000 and preferred stock of \$1,000,000 in exchange for the entire outstanding capital stock of three predecessor corporations. It had previously issued \$1000 of stock for \$1000 cash paid in by the incorporators. On January 31, 1907, thirteen days later, the three predecessors were merged with the Regal Shoe Co., all of their assets being turned into the Regal Shoe Co., that company surrendering all of the capital stock of such corporations for cancellation.

The issue involved taxpayer's invested capital under section 326 of the Revenue Act of 1918, and the case is pertinent here because of principles that were promulgated in resolving that issue. The Government argued that the transaction should be considered as a single transaction of the Regal Shoe Co., exchanging its stock for assets of the three predecessor corporations instead of considering that Regal stock was exchanged for the predecessor's stock and then thirteen days later Regal received the assets on liquidation of the predecessors.

The Board held that the invested capital was properly \$3,500,000, stating (p. 900) :

“It is undoubtedly true, as appears from the resolution of January 31, 1907, that the taxpayer at all times intended to acquire the business and assets of the three predecessor corporations, but the fact is that before it acquired these assets it had acquired the stock which the statute characterizes as tangible property, and the assets were acquired not for the stock of the taxpayer company but in liquidation of the stock of the other three corporations which it held. The one transaction was just as important and legally real as the other. During a 13-day period the ownership of the stock and of the assets was in different legal hands, and the practical and legal incidents of such ownership were different. *United States v. Phellis*, 257 U.S. 156. This is clear from the fact that at the time of the liquidation the assets received were worth more than the price previously paid for the stock. If the provisions of the 1918 Act had been in effect in 1907, no one would dispute the right of the Government to impose a tax upon the gain represented by the difference between the price paid and the amount received in liquidation, namely, the increase in actual value of the assets received in liquidation over the actual value of the stocks at the time the taxpayer acquired them for its own stock; and this would be true irrespective of the length of time which elapsed between acquisition of the stock and the subsequent liquidation thereof and receipt of the assets.”

Otto H. Kahn et al. v. Commissioner, 27 B.T.A. 244, involved these facts: The petitioners in the case acquired certain bonds in 1904 at a cost of \$143,155.28. In 1912 on a reorganization they exchanged the bonds for other bonds having a fair market value of some-

thing less than the original cost of \$143,155.28. By March 1, 1913, the bonds had further declined in value. They argued that the bonds received in the 1912 exchange should have the same basis as the cost of the bonds exchanged, \$143,155.28.

The Board held that the bonds took a new basis on the 1912 exchange pointing out that if the exchange had taken place after February 28, 1913 the 1904 basis would have carried through.

The case of *St. Louis Trust Co., Executor of the Will of Edwin Mallinckrodt, Sr., Petitioner, v. Commissioner*, 14 B.T.A. 323, involved this situation. Prior to March 1902, Edward Mallinckrodt, decedent, owned 500 shares of stock of the Union Trust Co. which cost him \$214.8713 per share. On March 1, 1902, the assets of the Union Trust Co. were taken over by the St. Louis Union Trust Co. On that date decedent exchanged his 500 shares of stock in the Union Trust Co. for 500 shares of stock in the St. Louis Union Trust Co. and \$92.00 cash per share. At the time of the exchange, the market value of the Union Trust Co. stock was \$446 per share. In 1921 petitioner sold the St. Louis Union Trust Co. stock for \$200.50 per share. The Board held that the petitioner sustained a loss in 1921 using as cost the March 1, 1902 market value of \$446 per share for the 500 shares of stock of Union Trust Co. exchanged, reduced by \$46,000.00 cash received at \$92.00 per share.

It is apparent under these decisions that in the instant case appellant is entitled to claim a loss on the sale of the land and building in 1945 measured by

the difference between their fair market value on February 21, 1906, less depreciation to the date of sale on the building, and the selling price in 1945.

III. Basis for Excess Profits Tax Credit.

The final question in this case is how appellant's invested capital credit under the excess profits tax law is affected by the 1906 liquidation of the Occident Trust Company. We believe that the determination of the gain or loss issue also controls this excess profits tax issue. The statute prescribes an extremely technical formula for determining invested capital credit. The first step is to reach back to the organization of the corporation and build up so-called equity invested capital in the following manner:

First: all the money and property that has ever been paid into the corporation for stock, as paid in surplus, or as a contribution to capital is aggregated—regardless of what may have happened to the money or property after its acquisition.

Second: the accumulated earnings and profits from the inception of the company up to the beginning of taxable year are added in. Any deficit, however, is disregarded.

Third: the sum of the first two items is reduced by all the distributions that have been made to stockholders out of other than earnings and profits.

These first three computations produce what is known as "equity invested capital."

In the instant case the Seattle Hardware Company

had a realized profit on the 1906 liquidation of the Occident Trust Company of the difference between the cost of the building and lots to the Occident Trust Company and the fair market value of the building and lots at the time of the liquidation (the difference between \$244,000 and \$270,751.38 for the building and the difference between \$60,000 and \$224,322 for the lots). This profit constituted an addition to accumulated earnings and profits, or an addition to paid in surplus, going into equity invested capital. As has been shown before and will be shown hereafter, in the transfer involved here, this profit is just as real and affects equity invested capital just as much as it would have in a transfer subjected to tax. The Seattle Hardware Company is entitled to the adjustment in equity invested capital.

The following cases involved issuance of stock for property either prior to the income tax law or under transactions that were not tax deferred under Sections 112 and 113, and their underlying principles are applicable to the excess profits tax issue herein.

The first case is that of the *The Maltine Co., Petitioner v. Commissioner*, 5 T.C. 1265. The Commissioner acquiesced in the decision in 1946; 1 C.B.3. The case involved the following facts: On February 6, 1878, a corporation known as The Maltine Manufacturing Co., was organized with a capitalization of 1,000 shares of a par value of \$100 each or a total capitalization of \$100,000. All of these shares were issued and outstanding on January 8, 1898, being held by four individual stockholders. In December

of 1897 a new corporation called The Maltine Co. was organized, with a capitalization of 10,000 shares of a par value of \$100 each, or a total capitalization of \$1,000,000. On January 8, 1898, the stock of The Maltine Co. was issued and thereafter held by the same four individual stockholders in the same proportionate interest as that of The Maltine Manufacturing Co. The stock was issued in accordance with a contract dated January 8, 1898 between the two corporations, whereby The Maltine Manufacturing Co. agreed to turn over all its assets to The Maltine Co., issuing all its stock to the stockholders of The Maltine Manufacturing Co. in their proportionate interests. The Tax Court said (pages 1271 and 1272):

“There seems to be no serious doubt that if the transaction had occurred in later years it would have qualified as a tax-free reorganization, and in that case petitioner would be required to use its transferor’s base for the purpose under discussion. The immediate question here, then, is whether the fact that the transaction occurred in 1898 leads to a different result.

“Section 718 (a) (2) of the code provides that property acquired for stock shall be included in the computation of equity invested capital at an amount equal to its basis (unadjusted) for determining loss upon a sale or exchange.

“Section 113 (a) of the code provides: ‘Basis (unadjusted) of Property.—The basis of property shall be the cost of such property; except that * * *.’

“There follow twenty-two exceptions to this basic rule, of which none is claimed by respondent to be applicable to the present situation. Consequently, we conclude that the petitioner’s basis of the property involved here for determining loss upon a sale or exchange is cost.”

The court then went on to examine the exceptions somewhat in detail and said:

“These exemptions, which do not apply here, are examined because they indicate the degree of precision with which the statute provides for the varying situations for which Congress intended to make special exceptions. The inevitable conclusion is that it meant exactly what it said when it said that the basis, except for the several special situations thereafter specifically set forth, should be cost. To hold petitioner’s basis for determining loss to be other than cost would be to create another exception, which we conceive to be properly the task of Congress if it is to be done.

“There now arises the question of the valuation of the assets acquired by petitioner as outlined above.”

The court went on to find that the value of the tangible property of The Maltine Co., acquired in the contract of January 8, 1898, was \$134,926.34 and the value of the good will or intangibles, was \$866,000.00 and the Maltine Company was entitled to use the total of the two, or \$1,000,926.34 in computing equity invested capital for excess profits tax purposes.

The case of *Florida Machine & Foundry Co. v.*

Fahs, 73 F.Supp. 379, (aff'd. C.C.A.-5 168 F.(2d) 957) involved the following facts: One Franklin G. Russell acquired a piece of land in 1912 for \$25,000, and used it in a sole proprietorship business called Florida Machine Works. On July 16, 1924, Mr. Russell, his son, and another employee, organized a corporation known as the Florida Machine & Foundry Company. Mr. Russell turned in the land and the other assets of the sole proprietorship in consideration of the new corporation, issuing one-half of its stock to him and approximately one half to his son, three qualifying shares being held by other people.

The corporation sold an unneeded portion of the land in 1941 and the issue in the case was the cost basis of that portion for gain or loss on the sale and the cost basis of the remainder for determining equity invested capital for 1941 and 1942. The government argued that the transfer to the corporation in 1924 was tax free and that Russell's basis carried over into the hands of the corporation.

The court examined the tax free sections in detail and held that the basis for both gain or loss and equity invested capital purposes was the fair market value at the time the property was transferred to the corporation even though the 1924 transfer had not been treated as a taxable transfer by Russell. Russell, in getting 50% of the stock of the corporation, did not have the required 80% to make the transfer tax free.

The case of *Independent Oil Co.* 6 T.C. 194 (the Commissioner acquiesced in the decision in 1946; C.B. 3) decided February 6, 1946, involved the fol

following facts: The petitioner in 1930 acquired the assets of a predecessor of the same name. In its excess profits tax return for 1940 in its computation of equity invested capital under the invested capital method, petitioner included property paid in for stock at cost, *i.e.*, the fair market value of the petitioner's stock paid for the old company's property, namely, \$3,156,558.67. The Government argued that petitioner should not have included property paid in for stock at cost but rather at the basis of the property to the petitioner's transferor.

Here, too, the Tax Court found that the necessary control did not remain in the transferor and decided the case for the petitioner after carefully examining the tax free reorganization sections of the Internal Revenue Code.

The case of *Henderson Overland Company*, 4 B. T.A. 1088 involved a determination of invested capital credit for income and profits taxes for 1919 and 1920. In August of 1916 the petitioner issued stock for a piece of real estate. The Government argued that petitioner's cost in the real estate for invested capital purposes was the cost of the transferor, the above transaction being a tax free exchange of the lot for stock under section 331 of the Revenue Act of 1918. The Board held that since the exchange took place prior to March 3, 1917 it was not covered by the tax free provisions. It held that since the cash value of the lot exceeded the par value of the stock issued therefor, the excess was to be treated as paid in surplus for purposes of computing invested capital.

IV. Conclusion

Appellant submits that the Occident Trust Company was a complete entity with a business purpose and business activity, and should be so recognized, and under applicable statutes and decisions appellant received the assets of the Occident Trust Company in liquidation thereof on February 21, 1906, and appellant's basis in the assets for gain or loss and equity invested capital is their fair market value on February 21, 1906, less depreciation on the improvements to the date of the sale in 1945.

Respectfully submitted,

H. B. JONES,

A. R. KEHOE,

R. B. HOOPER,

Attorneys for Appellant.

No. 12259

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Appellant

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INTERNAL REVENUE,
Appellee.

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HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF FOR THE APPELLEE

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,

S. DEE HANSON,
Special Assistants to the Attorney General.

J. CHARLES DENNIS,
United States Attorney.

HARRY SAGER,
Assistant United States Attorney.

THOMAS R. WINTER,
*Special Assistant to the Chief Counsel,
Bureau of Internal Revenue.*

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

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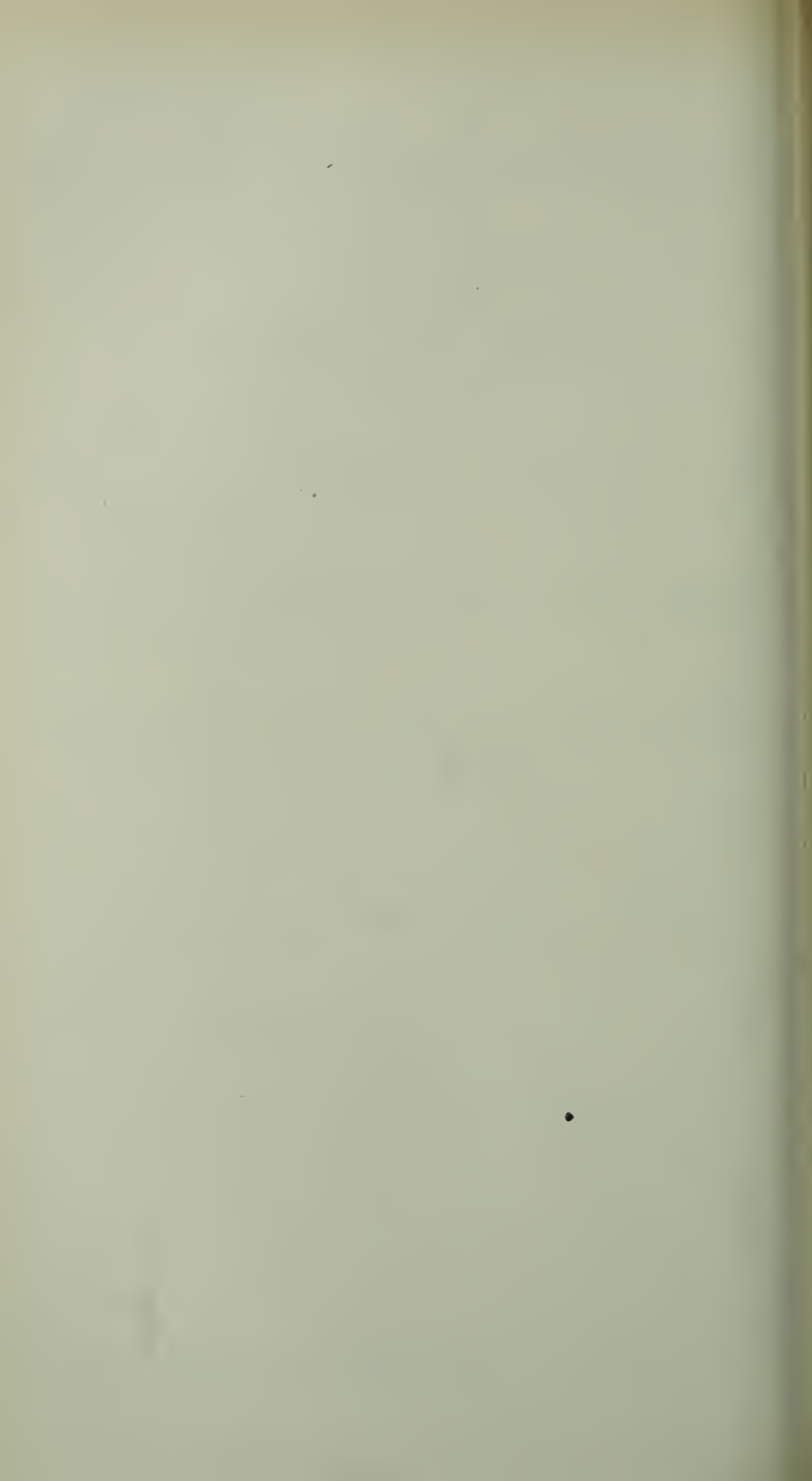
Special Assistants to the Attorney General.

J. CHARLES DENNIS,
United States Attorney.

HARRY SAGER,
Assistant United States Attorney.

THOMAS R. WINTER,
*Special Assistant to the Chief Counsel,
Bureau of Internal Revenue.*

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HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the District Court (R. 185-194)
is reported in 83 F. Supp. 106.

JURISDICTION

This appeal involves corporate income and excess profits taxes of the appellant (hereinafter called the taxpayer) for the fiscal years ended November

30, 1941, to November 30, 1945, inclusive, ¹ in the aggregate sum of \$202,681.10, together with interest thereon according to law. (R. 3-5, 36-41, 207, par 5.)

The total amount of taxes in dispute for the four taxable years involved was assessed pursuant to the taxpayer's corporate income, declared value excess profits, excess profits and defense tax returns timely filed for such taxable years, and timely paid to and collected by the Collector during the years 1942 to 1946, respectively. (R. 3-5, 36-41.) Claims for the refund thereof — except for the year ended November 30, 1942 — were timely filed by the taxpayer on or about August 15, 1946, and more than six months had elapsed after the dates of the filing of such claims and the filing of this action without any notice of allowance or rejection thereof having been sent to the taxpayer by the Commissioner of Internal Revenue. (R. 6-7, 44, 214.) The taxpayer on August 29, 1947, and within the time provided by Section 3772 of the Internal Revenue Code, filed a protective suit to recover the taxes in dispute and interest thereon according to law. (R. 2-26.) Jurisdiction was con-

¹ The taxes sought to be recovered herein for the taxable year ended November 30, 1942, are not involved because the taxpayer's claim for the refund thereof was filed after the statute of limitations had run. (R. 33, par. 4, R. 44, par. 20, R. 185, 213-214, par. 22.)

ferred upon the District Court by Section 24, Fifth, of the Judicial Code, as amended and qualified by Section 3772 of the Internal Revenue Code, as amended (now 28 U.S.C., Section 1340). (R. 185.) Judgment was entered by the District Court on April 11, 1949, in favor of the Collector, with costs. (R. 223-224.) Thereafter, within sixty days, notice of appeal was filed by the taxpayer on May 9, 1949. (R. 224-225.) The jurisdiction of this Court is invoked by the provisions of 28 U.S.C. Section 1291.

QUESTION PRESENTED

The taxpayer purchased two lots for \$60,000 in April, 1901, legal title to which was held by its attorney, as agent, until October, 1903, when he transferred it to the Occident Trust Company (hereinafter called Occident), allegedly the taxpayer's wholly-owned subsidiary which had never been completely organized or issued any of its certificates of capital stock to anyone. In February, 1906, a few months after the taxpayer's completion of the construction of a building on the property at a cost of \$244,000 out of its own funds, Occident, the nominal holder of the property, transferred title thereto to the taxpayer, subject to an existing mortgage of \$150,000, at the appreciated book value of \$225,000 allegedly in exchange for Occident's unissued stock, purportedly in

liquidation. The conveyance was held by the taxpayer until January, 1908, when it was first filed for record, and thereafter, on August 23, 1909, Occident, without liquidation or dissolution had, was stricken from the State rolls as a corporation for failure to have paid its annual license fee.

The question presented is whether the cost of the property should be measured by the amount of money actually expended by the taxpayer in connection therewith, or the fair market value thereof on the date title thereto was transferred to the taxpayer in 1906 in ostensible liquidation of Occident, in order to ascertain the statutory basis for determining the amount of loss sustained by the taxpayer on the sale of the property in the taxable year ended November 30, 1945, under the provisions of Section 23 (f) of the Internal Revenue Code, and also the bases for invested capital credits for excess profits tax purposes for all taxable years involved, under Section 718 (a) (2) of the Internal Revenue Code, as amended.

The answer to the question depends on a decision as to whether the corporate entity of Occident should be recognized for tax purposes in connection with the record ownership of the property from 1903 up to the time it was formally transferred by Occident to the taxpayer in 1906, that is, whether the property

was owned by Occident or by the taxpayer during that period.

STATUTE INVOLVED

The provisions of the statute involved are set forth in the Appendix, *infra*.

STATEMENT

The facts (including exhibits) were stipulated in part by the parties (R. 36-46), and were found by the District Court therefrom and from the testimony and documentary evidence accordingly (R. 206-220). The pertinent facts were summarized by the District Court, sufficiently for present purposes, as follows (R. 186-190):

The taxpayer was organized as a corporation and began doing business, engaged in the wholesale hardware business in Seattle, in March, 1885. It prospered and expanded with the rapid growth of the city during the years following its establishment. In 1901, long before the days of federal income taxes, as well as before the days when workmen's compensation laws were in existence in the State of Washington, the taxpayer desired to acquire two lots adjoining the one it then owned, upon which it intended

to erect a building sufficiently large to meet its then needs and its needs through the future years. (R. 186.)

A deed of conveyance, dated April 19, 1901, from Stetson & Post Mill Company to Ira Bronson evidenced the purchase of the property desired by the taxpayer, the consideration therefor being \$60,000, which was paid by the taxpayer. The purchase was made by Bronson as the taxpayer's agent, and for the reason the taxpayer believed a better bargain could be obtained by dealing in this manner. Ira Bronson at all times held title to this property in trust for the true owner, the taxpayer. (R. 186.)

On April 15, 1901, at the direction of the taxpayer, Mr. Bronson, together with two other persons not identified with the taxpayer in any manner, organized the Occident Trust Company as a corporation, and Bronson subscribed for the entire capital stock of this corporation, as is evidenced by its articles of incorporation. These articles of incorporation were filed with the secretary of state two days later, April 17, 1901. On the same day that the articles of incorporation were executed by Mr. Bronson and his co-incorporators, they all resigned. There was no stock certificate ever issued to Bronson by the corporation

for all or any part of its capital stock, and neither money nor property passed from Mr. Bronson, nor any other person or corporation, to Occident for any of its capital stock. Occident never issued stock to anyone, as it kept no stock book. However, on the day of the execution of its articles of incorporation, following the resignation of its incorporators, M. D. Ballard, F. W. Baker, and C. H. Black, trustees and stockholders of the taxpayer, were elected to fill the vacancies of those resigned; and on April 18th, at a meeting of the stockholders of Occident, M. D. Ballard was elected president; F. W. Baker, treasurer; and C. H. Black, secretary, though they were not legally chosen for these positions since there was no one representing Occident either as incorporator or as stockholder to choose them. (R. 186-187.)

On September 1, 1903, the taxpayer set up a building committee to perfect plans for the erection of a building on the lots in question, legal title to which was then in the name of Bronson, its attorney. It employed architects and took all the essential steps for the construction of the building desired by it. It carried through all negotiations in the way of financial obligations for the construction of such building. It paid all the costs for the construction of the build-

ing in the total sum of \$244,000,² though it had them charged on its accounts to Occident. It also, during this period of time, and in the whole period of time from the original acquisition of this property until the completion and acceptance of the building, paid all the taxes and assessments against the property; and it collected the receipts produced from certain minor rentals before the old buildings that stood upon the property were removed to make way for the new corporation. (R. 187-188.)

On October 1, 1903, a warranty deed, executed by Bronson and wife to Occident, for a recited consideration of \$100,000, was placed of record. There was no actual consideration whatever passing from Occident to Bronson either in money or in stock. Construction of the taxpayer's building, in accordance with its plans and specifications, under orders and directions of its building committee, was undertaken by taxpayer. (R. 188.)

On September 21, 1905, it having been found that additional funds would be required to complete the construction of the building, the taxpayer negotiated for a loan of \$150,000 for the purpose of

²It is stipulated that the building on the two lots in question was completed in 1905 at a total cost of \$244,000 (R. 43,188), as the taxpayer states (Br. 5).

securing such funds. A note and mortgage were given, the mortgage being signed by Occident and the note by Occident and the taxpayer, as well as by certain members of the taxpayer's board of directors as individuals. The money produced by this mortgage went into the treasury of the taxpayer, and all principal and interest on account thereof was paid by the taxpayer. (R. 188.)

On February 21, 1906, which was a few months after the completion of the building, a deed was executed by Occident through its officers, who purported to act as such, conveying the property from Occident to the taxpayer, subject to the existing mortgage of \$150,000. This conveyance was held by the taxpayer until January 20, 1908, when it was filed for record. Thereafter, Occident entirely passed out of the picture, and the taxpayer, which had previously paid the annual license fee of Occident, no longer made such payments, so that, in due time thereafter, under the laws of the State of Washington, Occident as a corporation was stricken from the rolls. There never was a liquidation of Occident, since it had no assets from the time it was incorporated until it was stricken by the secretary of state for failure to pay its annual license fee. (R. 188-189.)

The purchase price of the lots in question in this

last transaction, the conveyance from Occident to the taxpayer, was set up in the books of the taxpayer as being \$225,000. This was the appreciated value of the property from the time it was first acquired by the taxpayer in 1901 to the time of the formal conveyance by Occident to it. (R. 189.)

In 1945 the taxpayer sold the property here in question at a figure that would result in a substantial loss if its initial cost be considered as \$225,000, the sum of money represented to have been paid to Occident upon conveyance of this property to it. If the base figure for cost be taken as the amount of money the taxpayer paid through its attorney, Bronson, in 1901, for the acquisition of the property, \$60,000, then the sale of the property in 1945 would show a profit and support the taxes assessed and collected herein. (R. 189-190.)

It is clearly established in this case that the taxpayer paid in actual money no more than the original \$60,000 which was furnished to Bronson, its attorney, when the property was purchased on its behalf. The property while in Bronson's name was held by him as the agent and representative of the taxpayer and for the taxpayer's use and benefit, subject to its orders and directions, and the same condition prevailed during all the time title stood in the name of Occident.

The sole purpose and object of acquiring the property in question by the taxpayer was to construct a building suitable for the business being carried on by it to meet its immediate and prospective needs. The passing of title from Bronson to Occident, and the holding of such title by Occident, were to relieve the taxpayer from any liability that might arise during the course of construction of the building. The paper transactions relating to the ownership of this property did not remove it from the assets of the taxpayer from the date of its acquisition in 1901. (R. 190.)

Upon the basis of the foregoing facts, the District Court denied any recovery to the taxpayer on the grounds that Occident was not recognizable for tax purposes as an independent corporate entity because it was a fully controlled instrumentality created by the taxpayer merely to hold title to its property temporarily; that therefore the real cost of the property in question was the aggregate of the amounts of \$60,000 for the two lots and \$244,000 for the building thereon as originally paid therefor by the taxpayer out of its own funds; and that, consequently, these amounts constituted the proper cost bases for calculating the taxpayer's liability for its income and excess profits taxes for the several taxable years involved here. (R. 185-194, 220-222.) The court below thereupon entered judgment in favor of the Collector,

with costs, accordingly (R. 223-224), from which the taxpayer appealed to this Court for review (R. 224-225).

SUMMARY OF ARGUMENT

The District Court properly held that the separate entity of Occident, the taxpayer's alleged subsidiary, may not, under the facts and authorities, properly be recognized for tax purposes, and thereupon found, upon the evidence, the correct statutory bases for computing the taxpayer's loss sustained on the sale of the property in question in 1945, and its invested capital credits for excess profits tax purposes, to be the amounts actually paid by the taxpayer for the two lots and the building thereon out of its own funds. Consequently, the larger cost bases contended for by the taxpayer are wrong and should not be allowed.

The separate identity of Occident should be ignored because it was merely an instrumentality of the taxpayer's business under the complete domination and control of the taxpayer without any real business purpose or activity other than to hold record title to the property for the taxpayer's use and benefit. It was never completely organized, had no legally chosen officers, kept no stock book or other books or records of its own, and never issued any of its

authorized capital stock to the taxpayer or anyone else for the property it was supposed to have owned. It served merely as a conduit for the passage of title to the property from its predecessor, the taxpayer's agent, on to the taxpayer after completion of construction of the building on the two lots, and it later passed out of existence by default as a corporate structure after the taxpayer's purposes in forming it had been accomplished. It was merely the nominal holder without any management or control over the property, whereas the taxpayer was the beneficial and true owner from the date of the original acquisition until the sale thereof. Even though Occident might have been a complete corporate organization under local law, nevertheless state laws covering transactions valid thereunder are not controlling under the federal laws for federal tax purposes, as here. Moreover, since there was never any liquidation or dissolution of Occident, the taxpayer's claim that it is entitled to cost bases equal to the value of Occident's stock purportedly exchanged for the property in question upon liquidation of the subsidiary in 1906, is without support in the record.

ARGUMENT

THE DISTRICT COURT CORRECTLY FIXED THE STATUTORY COST BASES OF THE LAND AND BUILDING IN QUESTION FOR THE PROPER DETERMINATION OF THE TAXPAYER'S LOSS SUSTAINED ON THE SALE OF THE PROPERTY IN 1945, AND ITS INVESTED CAPITAL CREDITS FOR EXCESS PROFITS TAX PURPOSES FOR ALL TAXABLE YEARS

The question for decision is the ascertainment of the proper statutory bases of the two lots and building in question ³ (hereinafter referred to as the property) for determining the correct amount of the taxpayer's loss sustained on the sale of the property in the taxable year 1945,⁴ under the provisions of Section 23 (f) of the Internal Revenue Code (Appendix, *infra*), and also the correct amounts of invested capital credits allowable in computing the taxpayer's excess profits taxes for the taxable years 1941 to

³ The controversy here relates only to Lots Nos. 1 and 2 and the building constructed thereon, there being no dispute over the basis of Lot No. 3, acquired by the taxpayer in 1919, and the furniture and other personal property involved in the sale of the property in 1945. (R. 211, 215.)

⁴ For convenience, references herein to the taxable years 1941 to 1945, inclusive, should be understood to mean the taxable years ended on November 30th of each of those years.

1945,⁵ inclusive, under the provisions of Section 718 (a) (2) of the Internal Revenue Code, as amended (Appendix *infra*). Determinative of this is the question whether Occident or the taxpayer owned the property in question in 1906 when the taxpayer ostensibly received it from Occident, its alleged subsidiary, upon the purported liquidation of the latter in that year.

The District Court found upon the evidence and held that Occident was at all times herein the fully controlled instrumentality of the taxpayer and therefore its separate corporate identity may not be recognized for tax purposes (R. 186-194, 207-220); and that, accordingly, the correct cost bases for the two lots and the building were the respective sums of \$60,000 and \$244,000, paid by the taxpayer out of its own funds, to be used for determining the gain or loss on the sale of the property in 1945, and also for computing the invested capital credits for excess profits tax purposes for all the taxable years involved (R. 212-217, 220-221). These were the amounts used by the taxpayer in making its tax returns for the several taxable years involved as adjusted by the Commissioner and accepted by the taxpayer up until the time when it filed the claims for refund herein in

⁵ As shown, the taxable year 1942 is not involved herein. (App. Br. 2; see fn. 1, *supra*.)

August, 1946 (R. 43, 213-214). We submit that the District Court was correct in so holding.

The taxpayer contends that the District Court erred in holding that Occident had an incomplete existence, and that therefore its corporate entity should be disregarded for tax purposes. (Br. 10-34.)

It is our position that the District Court properly held that the separate entity of Occident may not, under the facts and authorities, properly be recognized for tax purposes; and that the statutory bases it determined and found upon the evidence are the correct ones to be used for both determinations — loss and credits — for the record shows that the taxpayer actually paid those amounts out of its own funds for the purchase of the two lots and the construction of the building thereon. Consequently, the cost bases for determining the loss and the credits in question as contended for by the taxpayer (\$224,322 and \$270,751.38 for the two lots and the building, respectively (Br. 7, 34, 44-45, 50)) are wrong and should not be allowed.

It may be assumed for the sake of argument that in determining the correct invested capital credits for the several taxable years involved, the taxpayer is entitled to include the property in question as “property * * * previously paid in”, under the provisions

of Section 718 (a) (2); and, further, that in ascertaining the correct amount of the loss on the sale of the property in 1945, the cost basis thereof must be the aggregate of the amounts actually paid by the taxpayer for the two lots in 1901 and for the construction of the building thereon in 1904-1905, as the District Court found, or the fair market value of the property on February 21, 1906, when the subsidiary's assets were allegedly, upon its liquidation, distributed to the taxpayer, as the taxpayer contends.

In the first place, we think it is significant that the taxpayer itself, in filing its tax returns for the several years involved, used the cost bases of \$60,000 and \$244,000 for the two lots and the building, respectively. (R. 43, pars. 14 and 17, R. 213-214.) While it originally used the cost basis in the sum of \$220,000 for the two lots in computing invested capital in its 1941 tax return, the Commissioner thereafter reduced the basis to \$60,000 as representing the actual cost to the taxpayer. The taxpayer, moreover, made no objection to his action for several years thereafter in that it used the \$60,000 basis for computing its invested capital credits for the four subsequent taxable years (1942-1945), as indicated by its later using that amount, as finally determined by the Commissioner, as the proper basis in reporting

the loss on the sale of the property in 1945. (R. 213-214.) In this connection, the taxpayer's accountant, Meals, testified that the reason that it had acquiesced in the Commissioner's adjustments of the basis and determination to such effect up until the 1945 return, inclusive, was that it did not wish to engage in a controversy over the matter with the Government during the war and thereby keep all its tax years open for those years. He also testified, however, that the taxpayer was satisfied to continue to report its invested capital on that basis, as adjusted by the Commissioner, for all taxable years because it contemplated recovering by way of refund anyway. (R. 177-178). Moreover, the record shows that the taxpayer used the same basis, as adjusted by the Commissioner, in determining and reporting the loss on the sale of the property in 1945. (R. 43, 178-179, 213-214.) While the taxpayer's sworn returns showing its statements as to such cost bases are not necessarily conclusive, they were nevertheless received in evidence and might well be considered by this Court, along with the other evidence (R. 43, 177-179, 213-214), as the taxpayer's own declarations and admissions which were contrary to its position now being asserted here. *Old Mission P. Cement Co. v. Commissioner*, 69 F. (2d) 676 (C.A. 9th), affirmed, 293 U.S. 289; *Bedell v. Commissioner*, 30 F. (2d) 622 (C.A. 2d); *Roche v.*

Commissioner, 63 F. (2d) 623 (C.A. 5th).

Next, the record shows quite plainly that the separate corporate identity of Occident should be disregarded for tax purposes, and therefore the bases for both loss and credits should be actual cost to the taxpayer. While the general rule is that the corporate identity will not be ignored (*Moline Properties v. Commissioner*, 319 U.S. 436, 438-439), there are nevertheless compelling exceptions thereto where, as here, the facts and circumstances warrant ignoring the corporate entity for tax purposes lest adherence to the general rule result in disregarding substance for form to the detriment of the fisc, or recognizing the subsidiary which was merely an instrumentality, adjunct, agent or nominee of the parent corporation without any real business purpose or activity shown, or in substance merely a branch of the business subject to the parent's complete domination and control (*National Carbide Corp v. Commissioner*, 336 U.S. 422; *Anderson v. Abbott*, 321 U.S. 349; *Gray v. Powell*, 314 U.S. 402, 414; *Higgins v. Smith*, 308 U.S. 473, 477; *Rockefeller v. United States*, 257 U.S. 176; *United States v. Reading Co.*, 253 U.S. 26, 62-63; *Gulf Oil Corp. v. Lewellyn*, 248 U.S. 71; *Southern Pacific Co. v. Lowe*, 247 U.S. 330; *Chicago M. & St. P. Ry. v.*

Minn. Civic Assn., 247 U.S. 490, 501; *United States v. Del., Lack. & West. R. R.*, 238 U.S. 516, 529; *Linn Timber Co. v. United States*, 236 U.S. 574; *United States v. Lehigh Valley R. R. Co.*, 220 U.S. 257, 273; *Titus v. United States*, 150 F. (2d) 508, 511 (C.A. 10th), certiorari denied, 326 U. S. 773; *Clover v. Commissioner*, 143 F. (2d) 570, 571-572 (C.A. 9th); *O'Neill v. Commissioner*, 170 F. (2d) 596, 598 (C.A. 2d), certiorari denied, 336 U.S. 937; *Wier Long Leaf Lumber Co. v. Commissioner*, 173 F. (2d) 549 (C.A. 5th); *Paymer v. Commissioner*, 150 F. (2d) 334 (C. A. 2d); *Halpin v. Commissioner*, 154, F. (2d) 112 (C.A. 2d); *Commissioner v. Smith*, 136 F. (2d) 556 (C.A. 2d)).

In this connection, the Supreme Court, citing several of the above cases, stated in *United States v. Reading Co.*, 253 U.S. 26, as follows (pp. 62-63):

It results that it may confidently be stated that the law upon this subject now is, that while the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful under the commodities clause for the railroad company to transport in interstate commerce the products of such mining company, yet where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the

purpose of making it a mere agent, or instrumentality or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require. * * *

National Carbide Corp. v. Commissioner, 336 U.S. 422, cited by the taxpayer (Br. 33) and distinguished hereinafter, is not at variance with the foregoing decisions, and quite apart from the factual differences between the cases, the Supreme Court's decision in *Higgins v. Smith*, 308 U.S. 473, points clearly to the difference in the questions of law involved, as follows (p. 477):

A taxpayer is free to adopt such organization for his affairs as he may choose and having elected to do some business as a corporation, he must accept the tax disadvantages.

On the other hand, the Government may not be required to acquiesce in the taxpayer's election of that form for doing business which is most advantageous to him. The Government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute. * * * It is command of income and its benefits which marks the real owner of property.

Thus, applying the rules laid down in the above-cited cases to the facts here, and looking through form to the realities of the relationship between the

taxpayer and the subsidiary, it is readily apparent that Occident had no existence at all as a complete corporate entity. It was never completely organized, had no stock book or other books and records of its own,⁶ and never issued or sold any of its authorized shares of capital stock to anyone. (R. 60.) Neither money nor property ever passed from the taxpayer or any other corporation or person to Occident for any of its shares of stock, and it had no *legally chosen* officers or directors.⁷ It is not shown to have conducted any business activity of any kind, having

⁶ The District Court found that the taxpayer's Exhibit 5 (Articles of Incorporation of Occident Trust Company and Minutes of its Board of Trustees and Stockholders from April 15, 1901, to September 20, 1905) was the only record Occident ever had. (R. 191.) The only records in respect of Occident were kept by the taxpayer on its own books. (R. 130-131, 209; Ex. 2 (taxpayer's Minute Book), and Ex. 8 (taxpayer's Private Ledger and Monthly Statement).)

⁷ The District Court found that upon the resignation of its incorporators on the date of the execution of Occident's articles of incorporation on April 17, 1901, certain trustees and stockholders of the taxpayer were elected to fill the vacancies of the incorporators then just resigned, and on the next day the same stockholders of the taxpayer were elected as officers of Occident, although they were not legally chosen for such positions because there was no one representing Occident either as incorporator or as stockholder to choose them. (R. 208.)

merely received title to the property in question from the taxpayer's attorney and agent, Bronson, who had no beneficial interest therein (R. 58), for the *recited* consideration of \$100,000, although no actual consideration whatever in money or stock ever passed between them. Occident, without any credit standing shown, had to rely on the taxpayer and certain members of its board of directors as individuals as guarantors, to join in signing the mortgage and note in order to secure the loan of \$150,000, *negotiated by the taxpayer*, for the additional funds necessary for *the taxpayer's* constructing the building on the lots in question. (R. 52-53, 130). Just as the taxpayer's agent, Bronson, transferred title to the property to Occident in October, 1903, without any consideration whatever — stock, money or property — therefor, so Occident ostensibly passed the title, subject to the \$150,000 mortgage, on to the taxpayer in February, 1906, without consideration shown in exchange therefor — money, shares of its own stock, or other property. The taxpayer received the deed therefor from Occident but did not file it for record until January, 1908, after which Occident, without liquidation or dissolution, was stricken from the state corporate records in 1909 for failure to have paid its annual li-

cense fees.⁸ (R. 56, 186-192, 208-210, 214-217.)

Under these facts, it is clear that the alleged subsidiary, instead of having conducted business in the ordinary meaning or having any real commercial reason for its organization, had no genuine business purpose or activity, and, indeed, was never completely organized as a corporate structure acting in any sense, directly or indirectly, as an independent entity. Rather, as shown, it was only a partially formed organization serving in the capacity of a department, adjunct, instrumentality, agent or nominee of the taxpayer as the nominal holder of title to the property in question during its short but incomplete existence (R. 64-65), and merely "considered * * * a holding company" by the taxpayer's own officers (R. 68). Thus, in effect it was merely a branch of the taxpayer, subject to its complete domination and control, as the District Court found and held. (R.

⁸ The taxpayer's Exhibit 7 (not printed in the record) contains the following statement by the Secretary of the State of Washington, dated February 21, 1948:

* * * the records of this office show that OCCIDENT TRUST COMPANY of Seattle, Washington, was stricken from our records on August 23, 1909 for non-payment of its annual license fees and has had no legal corporate existence in this state since that time. No formal dissolution papers were ever filed for this corporation.

191, 208-210, 214-216, 220.) Apropos of this situation, the court stated in *National Investors Corp. v. Hoey*, 144 F. (2d) 466 (C.A. 2d), as follows (pp. 467-468):

In that case (*Moline Properties v. Commissioner*, 319 U.S. 436) the question was whether the corporation might insist upon the Treasury's including capital gains within the gross income of its sole shareholder, and the court decided that it might not. That was the same situation as existed in *Burnet v. Commonwealth Improvement Co.*, *supra*, 287 U.S. 415, 53, S.Ct. 198, 77 L.Ed. 399. The gloss then put upon *Higgins v. Smith*, *supra*, was deliberate and is authoritative: it was that, whatever the purpose of organizing the corporation, "so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity." 319 U.S. 439, 63 S.Ct. 1134, 87 L.Ed. 1499. That, as we understand it, is the same interpretation which was placed upon corporate reorganizations in *Gregory v. Helvering*, 293 U.S. 465, 55 S.Ct. 266, 79 L.Ed. 596, 97 A.L.R. 1355, and which has sometimes been understood to contradict the doctrine that the motive to avoid taxation is never, as such, relevant. In fact it does not trench upon that doctrine; it merely declares that to be a separate jural person for purposes of taxation, a corporation must engage in some industrial, commercial or other activity besides avoiding taxation; in other words, that the term "corporation" will be interpreted to mean a corporation which does some "business" in the ordinary meaning; and that escaping taxation is not "business" in the ordinary meaning.

Thus, the court there emphasized (p. 468) the rule to be that, regardless of motives of tax avoidance, transactions between a corporation and its subsidiary for tax purposes may be disregarded as lacking in substance where, as here, the subsidiary is not engaged in carrying on "some 'business' in the ordinary meaning" of the term. Hence, in such cases, the mere holding of title, as by Occident here, does not constitute a separate business activity warranting recognition of the subsidiary's corporate form for tax purposes. As stated in *Moline Properties v. Commissioner*, 319 U.S. 436, 438-439, "Whether the purpose be * * * to serve the creator's personal or undisclosed convenience," when we have "appraised the relation between a corporation and its sole stockholder * * * there are recognized exceptions" for tax purposes where "In general, in matters relating to the revenue, the corporate form may be disregarded where it is a sham or unreal. In such situations the form is a bald and mischievous fiction."

There are further reasons why the corporate entity of Occident should be disregarded here. As shown, Occident did not take title to the property in any permanent sense and in its own behalf but rather, as did its predecessor titleholder, Bronson, who was also merely the taxpayer's nominee retained for the same purpose, solely as the taxpayer's *alter ego* and

subject to its complete domination and control. The record shows that Occident had no possible corporate function or purpose other than, like Bronson, to hold title to the property temporarily for the taxpayer's use and benefit. (R. 64-65, 120, 208-210, 214-216.) This is made manifest by the fact that upon Occident's transferring title to the property to the taxpayer, the latter held the deed in a dormant state and unrecorded until Occident had served all its purposes — escape from the risk of liability — in forestalling possible suits against the taxpayer in connection with the construction of the building on the two lots (R. 50-51, 60-62, 67), after which, without, liquidation or dissolution, it was permitted to become obliterated by operation of state law for nonpayment of its corporate license fees (R. 210). Considering Occident in its true relationship to the taxpayer, therefore, and in the light of the rules laid down in *United States v. Reading Co.*, 253 U.S. 26, 62-63, and *Moline Properties v. Commissioner*, 319 U.S. 436, 438-439, it is clear that it served the taxpayer's convenience merely as a branch or department of its business in order to hold the record title temporarily to its property. The taxpayer, however, was the beneficial and true owner of the property from its acquisition in 1901 until its sale in 1945, as the facts show and the District Court found and held. (R. 186-190, 207-211, 214-217, 220.)

Occident is not shown to have participated in the active management or control of the property, realized any income or declared any dividends, had any salaried officers or employees, or to have done anything whatever in a business sense or otherwise except to hold the record title to the property for the taxpayer. (R. 64-66.)

In these circumstances, it is clear that the corporate entity of Occident should be disregarded, and the property in question treated as belonging to the taxpayer in which the beneficial use and interest lay at all times herein. *Commissioner v. Court Holding Co.*, 324 U.S. 331; *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322; *Paymer v. Commissioner*, 150 F. (2d) 334, 337 (C.A. 2d); *Meurer Steel Barrel Co. v. Commissioner*, 144 F. (2d) 282 (C.A. 3d), certiorari denied, 324 U.S. 860; *Chisholm v. Commissioner*, 79 F. (2d) 14 (C.A. 2d), certiorari denied, 296 U.S. 641; *United States v. Brager Building & Land Corp.*, 124 F. (2d) 349 (C.A. 4th); *Continental Oil Co. v. Jones*, 113 F. (2d) 557 (C.A. 10th), certiorari denied, 311 U.S. 687; *Meeker v. Durey*, 92 F. (2d) 607 (C.A. 2d); *Bourjois Inc. v. McGowan*, 85 F. (2d) 510 (C.A. 2d); certiorari denied, 300 U.S. 682; *McInerney v. Commissioner*, 82 F. (2d) 665 (C.A. 6th) (involving a dummy corporation created to complete the sale and transfer of property); *Munson S. S. Line v. Commis-*

sioner, 77 F. (2d) 849 (C.A. 2d); *112 West 59th Street Corp. v. Helvering*, 68 F. (2d) 397, 398 (C.A. D.C.) (holding that the corporate entity should be disregarded because it furnished only the structure for its taking and holding title and the channel through which title should pass when the sale of the property was made while it held legal title thereto); *United States v. Jelenko*, 23 F. (2d) 511, 515 (Md.); cf. also *Inland Development Co. v. Commissioner*, 120 F. (2d) 986 (C.A. 10th); *North Jersey Title Ins. Co. v. Commissioner*, 84 F. (2d) 898 (C.A. 3d); *Hay v. Commissioner*, 2 T.C. 460, affirmed, 145 F. (2d) 1001 (C.A. 4th), certiorari denied, 324 U.S. 863; *Glenn v. Commissioner*, 3 T.C. 328.

In *United States v. Brager Building & Land Corp.*, 124 F. (2d) 349 (C.A. 4th), the court stated as follows (p. 352):

The purely nominal character of the Brager Building and Land Corporation is established beyond question by the undisputed facts set out above. It was a convenient agency chosen by the owners to hold the record title of their property, and nothing more. It performed no other function, it engaged in no other activity, and was at all times completely subject to the dominion and control of the Brager partnership. The income from the property was in our opinion income of the partnership.

In *Inland Development Co. v. Commissioner*, 120

F. (2d) 986 (C.A. 10th), wherein the corporate entities of the subsidiaries were disregarded and the property was treated as belonging to the parent corporation for tax purposes, the court stated as follows (pp. 989-990):

The fact that a parent corporation owns all of the stock of its subsidiary, of itself and alone, does not warrant the disregard of their separateness of corporate entity. That separateness is disregarded where the ownership of stock is used to dominate and control the subsidiary in such manner and to such extent that it becomes a mere agency or instrumentality of the parent.
* * *

* * *. They (the subsidiaries) did not buy, acquire, manage, control, sell, receive, or pay out anything. The taxpayer did all of that, without voice on the part of the subsidiaries. * * *. But whatever the underlying reason (for forming the subsidiaries) may have been, it is clear that the subsidiaries were nothing more than voiceless departments or instrumentalities of the taxpayer. Substance is paramount over form in the application of income tax laws. *United States v. Phellis*, 257 U.S. 156, 42 S.Ct. 63, 66 L.Ed. 180; *Tulsa Tribune Co. v. Commissioner of Internal Revenue*, 10 Cir., 58 F. (2d) 937; *Reynolds v. Cooper*, 10 Cir., 64 F. (2d) 644, affirmed, 291 U.S. 192, 54 S.Ct. 356, 78 L.Ed. 725; *North Jersey Title Insurance Co. v. Commissioner of Internal Revenue*, 3 Cir., 84 F. (2d) 898; *Commissioner of Internal Revenue v. Texas Pipe Line Co.*, 3 Cir., 87 F. (2d) 662. In harmony with that recognized rule, the separateness of corporate entity of the taxpayer and its subsidiaries should be disregarded in determining

whether the taxpayer was a holding company, coming within the ambit of the statute. * * *.

In *United States v. Jelenko*, 23 F. (2d) 511 (Md.), the court stated as follows (p. 515):

* * * the corporation was only a legal concept, a name to be used as a business convenience, with no means to conduct substantial transactions in real estate. But the facts in connection with the moneys on deposit and the books of account are not consistent with the theory of corporate ownership. It would be, in the opinion of the court, a forced construction to hold that the mere grant of a corporate charter, and the occasional use of the corporate name, so changed the legal situation that the business became corporate in law, although the activities of the defendants were continued as theretofore in the partnership relation.

Many of the cases cited by the taxpayer (Br. 20-34) were distinguished by the District Court (R. 192-193). Thus, *Haskell v. M'Clintic-Marshall Co.*, 289 Fed 405 (C.A. 9th), and *Moline Properties v. Commissioner*, 319 U.S. 436, relied on particularly by the taxpayer (Br. 20-26, 29, 33), were both distinguished below (R. 192-193) on the ground that the corporate structures of the subsidiaries there were in all respects completely organized corporations carrying on business activities within the limits of their articles of incorporation, issuing stock and keeping books and records, assuming business responsibilities entirely independent of their parent corporations, and

had real business purposes for their existence beyond being the mere *alter ego*, agent, instrumentality or conduit of their parent corporations. All these factors are absent in the present case. In the *Moline Properties* case, the Supreme Court stated (p. 440):

In 1934 petitioner engaged in an unambiguous business venture of its own — it leased a part of its property as a parking lot, receiving a substantial rental. The facts, it seems to us, compel the conclusion that the taxpayer had a tax identity distinct from its stockholder.

It is clear that, as shown, the facts here compel the opposite conclusion.

The recent decision in *National Carbide Corp. v. Commissioner*, 336 U.S. 422, also relied on by the taxpayer (Br. 25, 29, 33), was handed down after the present case was decided. The Supreme Court, although recognizing the corporate entity under the particular facts there, nevertheless made it clear that if one corporation acts merely in a nominal capacity as the fully controlled instrumentality or agent of another, as herein, the entity of the corporation so acting may be disregarded for tax purposes. The subsidiary corporations there, however, were formed, operated and utilized by the parent corporation for the express purpose of conducting certain real business activities as operating companies for the parent in the manufacture and sale of their products, and

they made profits which, in excess of 6% on their capitalization, they paid to the parent corporation. Thus they actively carried on business activities on their own account, a situation not present here. Consequently, aside from the clear factual differences between the two cases, there is nothing in that case repugnant to the District Court's holding here.

Finally, such cases as *Commissioner v. Laughton*, 113 F. (2d) 103 (C.A. 9th), and *Rogan v. Starr Piano Co., Pacific Division*, 139 F. (2d) 671 (C.A. 9th), for example, likewise relied on by the taxpayer (Br. 25-26, 30-31), are clearly distinguishable on their facts, as the District Court held (R. 193). In fact, this Court indicated that the question of respecting or ignoring the separate corporate entity in the *Laughton* case was to be determined in accordance with the rules enunciated in *Higgins v. Smith*, 308 U.S. 473, as we have already demonstrated in respect of the issue here. This Court found it necessary, however, to remand the *Laughton* case to the Board of Tax Appeals to make a finding as to whether the taxpayer's solely owned corporation was used for an independent business purpose or for a transfer of assets (his services), with control retained, solely to reduce tax liability.

In the *Starr Piano Co.* case, where this Court

held that there was no legal basis for ignoring the corporate entity of the taxpayer's subsidiary in determining whether there was a merger under California law, it was undisputed that the two corporations were and had been entirely separate organizations for many years, conducting wholly separate business activities over a long period of time and keeping separate corporate books and records. Thus, there were ample grounds for recognizing the corporate entity there. Here, however, as shown, the evidence clearly discloses an arrangement under which there was merely a temporary nominal holding of the record title to the property by the alleged subsidiary, and that it was used as a mere conduit for the taxpayer's purposes. Hence, the present case, unlike that case, was, as this Court quoting from *New Colonial Co. v. Helvering*, 292 U.S. 435, stated (p. 674), "subject to the qualification that the separate identity may be disregarded in exceptional situations".

Finally, the taxpayer makes the further argument that the organization of Occident was complete under local law. (Br. 10-13.) The facts and authorities do not support its contention in this respect. The issue here is determinable by federal rather than state law for federal law must be consulted and the federal statutes construed

in determining what particular rights should be taxed. *Morgan v. Commissioner*, 309 U.S. 78; *Helvering v. Producers Corp.*, 303 U.S. 376. The legal significance of a transaction under state law is not necessarily controlling in federal tax matters. *Helvering v. Stuart*, 317 U.S. 154, 161; *United States v. Pelzer*, 312 U.S. 399, 402-403; *Leicht v. Commissioner*, 137 F. (2d) 433, 435 (C.A. 8th). It is settled that state laws covering transactions valid thereunder are not controlling for federal tax purposes unless Congress has expressly or by implication indicated that local law was to be decisive, a situation not present here. *Commissioner v. Tower*, 327 U.S. 280, 287; *Helvering v. Clifford*, 309 U.S. 331; *Lyeth v. Hoey*, 305 U.S. 188; *Lucas v. Earl*, 281 U.S. 111; cf. *Commissioner v. Sunnen*, 333 U.S. 591, 605-606.

It is the taxpayer's position that, contrary to the District Court's decision, the separate identity of Occident should be respected to the end that the cost bases of the property in question for purposes of determining the loss and invested capital credits should be the fair market value of Occident's stock surrendered when the property was transferred to it in 1906. (Br. 34-50.) The argument is that since it acquired the property upon the liquidation of Occident on February 21, 1906, in exchange for the lat-

ter's stock which the taxpayer allegedly owned,⁹ the basis for determining the loss on the sale of the property in 1945 was the cost to the taxpayer, as provided in Sections 112 and 113 (a) of the Internal Revenue Code (Appendix, *infra*); and that such cost must be measured by the fair market value of the stock it owned in the subsidiary on the date of liquidation and dissolution thereof, which value in turn must be measured by the fair market value of the assets of the subsidiary which the taxpayer received in exchange for the latter's stock. (Br. 34-44.) It urges further that the correct amounts of invested capital credits allowable in computing its excess profits taxes for the several taxable years involved are determinable by including the property which it received from the subsidiary on the basis of cost which it claims should be measured by the fair market value of the property on February 21, 1906, the alleged date of its acquisition, the same as the alleged bases for determining the loss.¹⁰ (Br. 44-50.) In such event, the bases for

⁹ Section 115 (c) of the Internal Revenue Code (Appendix, *infra*) provides that amounts distributed in complete liquidation of a corporation "shall be treated as in part or full payment in exchange for the stock."

¹⁰ In computing federal excess profits taxes, corporations are permitted, at their option, to use an "invested capital" credit for each taxable year, as provided by Section 714 of the Internal Revenue Code

determining the loss and invested capital credits would be the respective sums of \$224,322 and \$270,751.38 for the two lots and the building at the time of the purported transfer by Occident to the taxpayer on February 21, 1906.¹¹ (Br. 34 - 49.)

We have already shown, however, that under the facts and decisions, the corporate entity of Occident

(26 U.S.C. 1946 ed., Sec. 714). Section 716 of the Code (26 U.S.C. 1946 ed., Sec. 716) provides that "The average invested capital" for any taxable year shall be the aggregate of the daily invested capital for each day of such year, divided by the number of days in such year. Section 717 of the Code (26 U.S.C. 1946 ed., Sec. 717) provides that the "daily invested capital" shall be the sum of the "equity invested capital" for such day plus the "borrowed invested capital" for the day, determinable under Section 719 of the Code. Section 719 of the Code (26 U.S.C. 1946 ed., Sec. 719) in turn defines the method of computing borrowed invested capital, which is not involved here. Section 718 (a) (2) of the Code (Appendix, *infra*) defines equity invested capital on any day in the taxable year to include the property paid in for stock, paid-in surplus, or as a contribution to capital, and provides that the property shall be included in an amount equal to its basis (unadjusted) for determining loss upon a sale or exchange.

¹¹ If the taxpayer's position is correct, there is no dispute over the fair market value of the property in question at the time of the alleged transfer of title thereto from Occident to the taxpayer on February 21, 1906, for it is stipulated that the two lots had a value of \$224,322 and the building a value of \$270,751.38 on that date. (R. 43-44; App. Br. 34.)

must be disregarded here for tax purposes; that no stock of Occident was ever issued or turned over for the property in question to the taxpayer or anyone else (R. 208); and that the actual cost of the property in question, as paid by the taxpayer out of its own funds, was \$60,000 for the two lots in 1901, and \$244,000 for the construction of the building in 1904-1905, as the District Court found and held (R. 214, 216-217).

The record shows that, contrary to the taxpayer's contentions (Br. 34-35, 38, 44, 50), there was no liquidation or dissolution of Occident or distribution of its assets in February, 1906, or at any other time. It remained in existence, incomplete as it was, until August 23, 1909, when it was stricken from the state records as legally non-existent for nonpayment of its annual corporate license fees. (R. 56, 189, 210; see fn. 8, *supra*.) Furthermore, although Occident, through its purported officers — who were also officers and stockholders of the taxpayer — executed a conveyance in 1906 ostensibly transferring title to the property to the taxpayer, the deed was never recorded until January 20, 1908, pursuant to the understanding of the parties that it was to be held in abeyance without being filed for record pending the settlement of potential claims for legal liability which

would, under such circumstances, arise against the subsidiary — instead of the taxpayer — during the course of the construction of the building. (R. 50-51, 67, 123, 190.)

In these circumstances, it is apparent that in view of the close relationship between Occident and the taxpayer, the deed during the two-year period before it was actually recorded in 1908 could readily have been invalidated through its return to the subsidiary or upon destruction by the taxpayer. Hence, there is shown no completed, effective legal transfer of the property by Occident to the taxpayer until the deed was recorded in 1908 at the earliest, and consequently no absolute and unconditional transfer to and receipt of the property by the taxpayer from Occident under the purported conveyance of February 21, 1906. This is true even assuming that, contrary to the facts and decisions, Occident was a real corporation recognizable for tax purposes instead of, as shown, merely an instrumentality of convenience completely controlled by the taxpayer at all times. *American Liberty Oil Co. v. Commissioner*, 43 B.T.A. 76, affirmed, 127 F. (2d) 262 (C.A. 5th), certiorari denied, 317 U.S. 648; *Beretta v. Commissioner*, 1 T.C. 86, affirmed, 141 F. (2d) 452 (C.A. 5th), certiorari denied, 323 U.S. 720; *Jones v. Dawson*, 148 F. (2d)

87 (C.A. 10th); *Jones v. Dawson*, 148 F. (2d) 822 (C.A. 10th). Accordingly, even under its own theory, the taxpayer must necessarily fail for lack of proof in attempting to establish the fair market value of the property on the critical date of the alleged transfer (February 21, 1906) for the only evidence in the record as to the real value of the property is the value as of that date, as stipulated (R. 43-44), and there is no proof as to the value of the property on any subsequent date. It follows, we submit, that the taxpayer has failed to establish any bases for the property in question for determining the claimed loss and invested capital credits for excess profits tax purposes, other than those correctly determined and found, upon the evidence, by the District Court.

CONCLUSION

The judgment of the District Court is correct and should therefore be affirmed upon review by this Court.

Respectfully submitted,

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,

S. DEE HANSON,
*Special Assistants to the
Attorney General.*

J. CHARLES DENNIS,
United States Attorney.

HARRY SAGER,
Assistant United States Attorney.

THOMAS R. WINTER,
*Special Assistant to the Chief Counsel
Bureau of Internal Revenue*

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(f) *Losses by Corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

* * * *

(26 U.S.C. 1946 ed., Sec. 23.)

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.* — The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

* * * *

(26 U.S.C. 1946 ed., Sec. 111.)

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or ex-

change of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind.*—

* * * *

(6) *Property received by corporation on complete liquidation of another.*—No gain or loss shall be recognized upon the receipt by a corporation of property distributed in complete liquidation of another corporation. * * *

* * * *

(26 U.S.C. 1946 ed., Sec. 112.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that —

* * * *

(11) *Property acquired during affiliation.*—In the case of property acquired by a corporation, during a period of affiliation, from a corporation with which it was affiliated, the basis of such property, after such period of affiliation, shall be determined, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, without regard to inter-company transactions in respect of which gain or loss was not recognized. * * *

(15) *Property received by a corporation on complete liquidation of another.*—If the property was received by a corporation upon

a distribution in complete liquidation of another corporation within the meaning of Section 112 (b) (6), then the basis shall be the same as it would be in the hands of the transferor. The basis of property with respect to which election has been made in pursuance of the last sentence of Section 113 (a) (15) of the Revenue Act of 1936, as amended, shall, in the hands of the corporation making such election, be the basis prescribed in the Revenue Act of 1934, as amended.

(26 U.S.C. 1946 ed., Sec. 113.)

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

*

*

*

*

(c) *Distributions in Liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. * * *

*

*

*

*

(26 U.S.C. 1946 ed., Sec. 115.)

SEC. 718 [As added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974].
EQUITY INVESTED CAPITAL.

(a) *Definition.*—The equity invested capital for any day of any taxable year shall be determined as of the beginning of such day and shall be the sum of the following amounts, reduced as provided in subsection (b)—

* * * *

(2) [As amended by Sec. 218 of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Property paid in.* — Property (other than money) previously paid in (regardless of the time paid in) for stock, or as paid-in surplus, or as a contribution to capital. Such property shall be included in an amount equal to its basis (unadjusted) for determining loss upon sale or exchange. If the property was disposed of before such taxable year, such basis shall be determined¹² under the law applicable to the year of disposition, but without regard to the value of the property as of March 1, 1913. If the property was disposed of before March 1, 1913, its basis shall be considered to be its fair market value at the time paid in. * * *

* * * *

(4) *Earnings and profits at beginning of year.*—The accumulated earnings and profits as of the beginning of such taxable year.

* * * *

(26 U.S.C. 1946 ed., Sec. 718.)

¹² Prior to this amendment by Section 218 of the Revenue Act of 1942, the material in the third sentence following the phrase, "such basis shall be determined", read "in the same manner as if the property were still held at the beginning of such taxable year. If such unadjusted basis is a substituted basis it shall be adjusted, with respect to the period before the property was paid in, in the manner provided in Section 113 (b) (2);" which provisions are applicable to the taxpayer's fiscal year ended November 30, 1941.

In The United States Court of Appeals
For the Ninth Circuit

SEATTLE HARDWARE COMPANY, *Appellant,*

vs.

CLARK SQUIRE, Collector of Internal Revenue,
Appellee,

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

REPLY BRIEF FOR APPELLANT

H. B. JONES,
A. R. KEHOE,
R. B. HOOPER,

Attorneys for Appellant.

610 Colman Building,
Seattle 4, Washington.

In The United States Court of Appeals
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H. B. JONES,
A. R. KEHOE,
R. B. HOOPER,
Attorneys for Appellant.

610 Colman Building,
Seattle 4, Washington.

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In The United States Court of Appeals
For the Ninth Circuit

SEATTLE HARDWARE COMPANY,

Appellant,

vs.

CLARK SQUIRE, Collector of Internal
Revenue,

Appellee.

No. 12259

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

REPLY BRIEF FOR APPELLANT

INTRODUCTORY

At pages 16 and 17 of his brief, appellee makes the following concession:

“It may be assumed for the sake of argument that in determining the correct invested capital credits for the several taxable years involved, the taxpayer is entitled to include the property in question as ‘property * * * previously paid in,’ under the provisions of Section 718 (a) (2); and, further, that in ascertaining the correct amount of the loss on the sale of the property in 1945, the cost basis thereof must be the aggregate of the amounts actually paid by the taxpayer for the two lots in 1901 and for the construction of the building thereon in 1904-1905, as the District Court found, or the fair market value of the property on February 21, 1906, when the subsidiary’s assets were allegedly, upon its liquidation,

distributed to the taxpayer, as the taxpayer contends."

That narrows the issues down to the points raised in his argument as follows:

1. "The separate identity of Occident should be ignored because it was merely an instrumentality of the taxpayer's business under the complete domination and control of the taxpayer without any real business purpose or activity other than to hold record title to the property for the taxpayer's use and benefit."

2. "Even though Occident might have been a complete corporate organization under local law, nevertheless state laws covering transactions valid thereunder are not controlling under the federal laws for federal tax purposes, as here."

3. "Moreover, since there was never any liquidation or dissolution of Occident, the taxpayer's claim that it is entitled to cost bases equal to the value of Occident's stock purportedly exchanged for the property in question upon liquidation of the subsidiary in 1906, is without support in the record."

ARGUMENT

The issue presented in point one above has been fully covered by appellant's opening brief.

The issue presented in point three above has been fully covered by appellant's opening brief. At pages 38 to 41, appellant cited a number of decisions to the effect that where a parent takes all of the assets out of a subsidiary that is a liquidation of the subsidiary even though it is not immediately followed by formal dissolution. Appellee cites no authorities at all on this point.

Under point two, appellee refers to that portion of appellant's brief which establishes that Occident's organization was complete under local law, and then states that the issue is determinable by federal rather than state law. Appellee cites a number of decisions all on the general point that the legal significance of a transaction under state law is not necessarily controlling in federal tax matters.

First of all it should be noted that appellee cites no authorities to the effect that the organization of Occident would be incomplete under federal law. Secondly, appellee cites no authorities to the effect that the completeness or incompleteness of the organization of Occident is controlled by federal rather than state law.

Appellant assumed the question of the completeness of the organization of Occident was controlled by state law since it was state law that gave Occident its corporate life. The authorities agree.

Section 61.09 of Mertens' Law of Federal Income Taxation, Volume 10A, pages 266-269, states the general rule of when state or federal law applies as follows:

"While the federal courts have generally sought to respect the decisions of the state courts regarding rules of property in the interpretation of the income tax law, this has not been possible in every instance and a conflict has frequently resulted. The Supreme Court has attempted to resolve the conflict by establishing two rules, as follows:

"(1) Where the question is the meaning of a federal statute, such as the revenue act, the will of Congress controls, and the federal statute is to be interpreted so as to give a 'uniform application to a nation-wide scheme of taxation' so that taxation may not be escaped through local decisions.

"(2) When the will of Congress depends upon a fact which can be interpreted only according to a state rule of property, as upon the question whether title has passed under state law, the state rule will govern."

Section 61.15 (Volume 10A, page 287) states in part:

"Corporations, as creatures of local law, are governed thereby in all respects not conflicting with specific income tax provisions."

The question of whether Occident's organization was complete or not is really a question of whether or not the corporate life had commenced. Basically, that question involves the same application of state or federal law as the question of whether or not the cor-

porate life has terminated. In the latter situation the courts have uniformly held that state law and not federal law controls. The Ninth Circuit in the case of *G. M. Standifer Construction Corporation v. Commissioner*, 78 F.(2d) 285, so determined when they cited with approval the following language of the Supreme Court of the United States in *Oklahoma Natural Gas Co. v. State of Oklahoma*, 273 U.S. 257, 259, 47 S. Ct. 391, 392, 71 L. ed. 634:

“But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being.”

CONCLUSION

Taxpayer should prevail in this case.

Respectfully submitted,

H. B. JONES,
A. R. KEHOE,
R. B. HOOPER,

Attorneys for Appellant.



No. 12260

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

THOMAS KELLY,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS

United States Attorney

HARRY SAGER

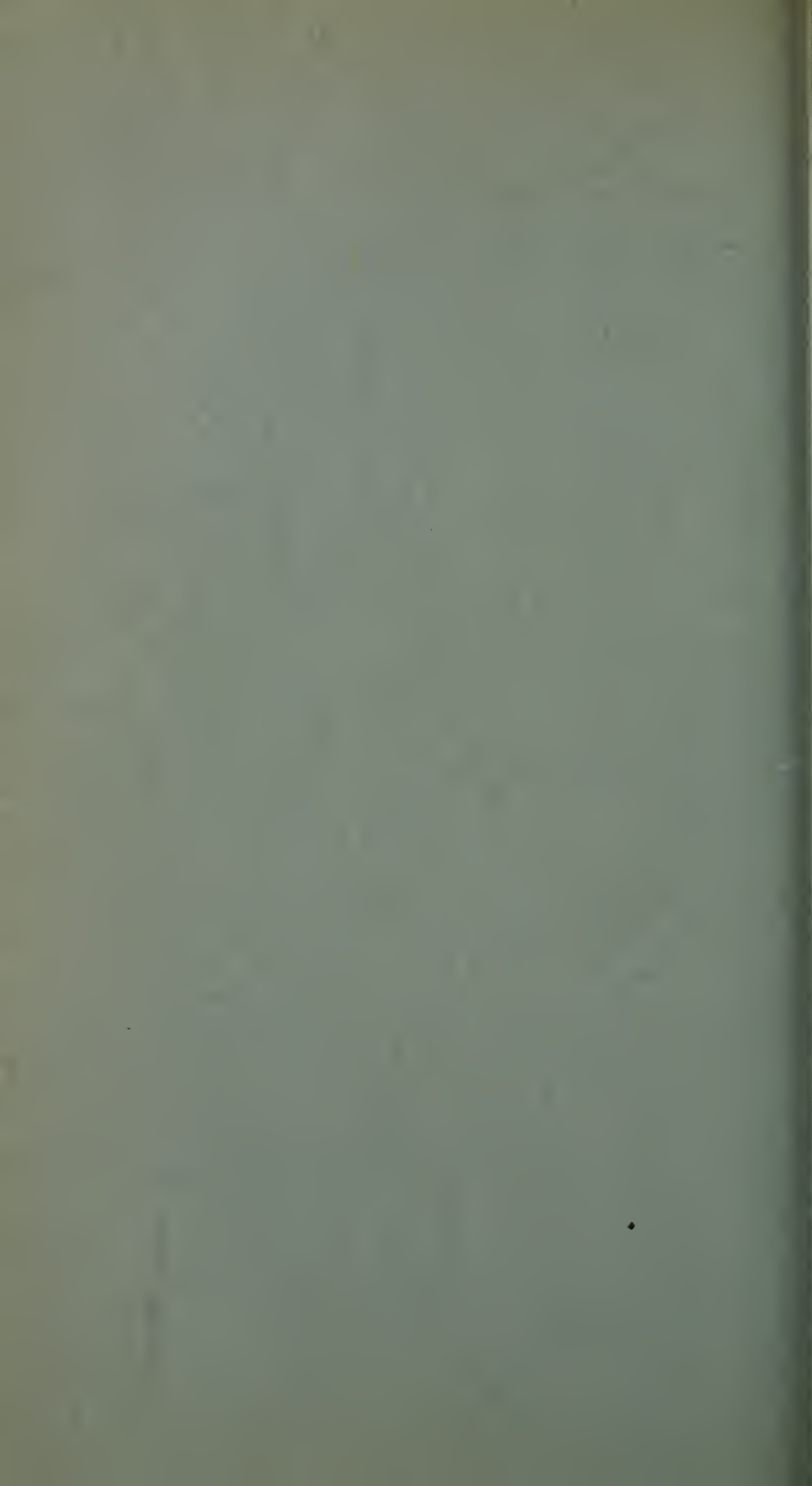
Assistant United States Attorney

VAUGHN E. EVANS

Assistant United States Attorney
Attorneys for Appellee

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

SEP 1 1949



No. 12260

IN THE
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BRIEF OF APPELLEE

J. CHARLES DENNIS

United States Attorney

HARRY SAGER

Assistant United States Attorney

VAUGHN E. EVANS

Assistant United States Attorney
Attorneys for Appellee

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

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IN THE
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THOMAS KELLY,

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vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLEE

JURISDICTION

In the present case appellant Tom Kelly was regularly indicted, represented by counsel, tried and convicted of murder in the first degree and sentenced to life imprisonment upon the jury's verdict which recommended against capital punishment. A copy of the indictment is found on Page 2 of the appellant's

brief. Jurisdiction is based upon Title 18, U.S.C., Section 1111.

As alleged in the indictment, the offense was committed on the Quillayute Indian Reservation which is land belonging to the United States of America and as such is within the territorial jurisdiction of the United States. The Quillayute Indian Reservation lies within Jefferson and Clallam Counties in the Northern Division of the Western District of Washington.

STATEMENT OF THE CASE

The appellant, Tom Kelly, is an Indian. The victim's name was Horace Bright who was likewise an Indian and the natural father of the appellant Tom Kelly. Ivy George is the mother of the appellant Tom Kelly and the common-law wife of the deceased Horace Bright. She is likewise an Indian.

On the night of October 25, 1948, the appellant Tom Kelly, his father Horace Bright, and his mother Ivy George, were temporarily residing in a two room dwelling owned by one Coe at La Push, Washington, on the Quillayute Indian Reservation. Tom Kelly and Horace Bright had been engaged in commercial fishing for the past few days. On the evening of October 25, 1948, Tom, Horace and Ivy, together with two other Indians, drove to Forks, Washington, some 12

to 15 miles away and procured two cases of beer, a gallon of wine and some whiskey. While driving back to La Push some of the liquor was consumed. Tom, Horace and Ivy arrived at the Coe residence at approximately midnight.

Thereafter, Tom Kelly resumed work on a dip net which he was making for another fisherman. Horace objected to Tom making dip nets for other fishermen and there was an argument between the two. Some time after that argument had subsided Horace Bright became embroiled in an argument with Ivy George and started beating Ivy George about her head with his fists. Tom Kelly paid no attention to this action. Apparently Tom had his back turned to his father and mother during this time. Immediately thereafter Tom Kelly looked up and saw Horace with a knife in his hand. Tom does not now know whether or not Horace was holding the knife in any menacing manner (Tr. 245, 246, 247, 248). Tom grabbed the hunting knife and attacked Horace Bright stabbing him eight times. When Tom first stabbed Horace, Horace dropped his knife and grabbed Tom to keep from falling (Tr. 248, 249). Horace Bright did not make any attempt to stab Tom and Tom was not cut or wounded in any way. The wounds inflicted by Tom were; one in the right buttocks, one on the left side

approximately half-way between the waist and armpit puncturing the lung, one in the back of the neck, one through the upper right arm, one just under the right armpit puncturing the lung and three in the right breast near the shoulder (See reproductions of exhibits 3, 4, 14 and 15 in appendix hereto).

At a result of these wounds Horace Bright died almost immediately. Tom Kelly and Ivy George dragged the body to the bed. Ivy George covered the body and then, at Tom's request, left the Coe residence to hitchhike to Yakima. Before leaving, Ivy George poured out a quart of the wine and took it with her. The appellant Tom Kelly drank two or three more bottles of beer and laid down on the floor near the stove and slept the night through with his clothes still covered with the blood of Horace Bright (Tr. 253).

The next morning Tom Kelly took the remains of the beer and wine to a neighbor's house and tried to sell it. Tom then proceeded towards Seattle, running out of money at Port Angeles where he sold his watch and the murder weapon, his hunting knife, for \$1.00. In Seattle Tom stayed overnight at the Travelers Hotel and the following morning gave himself up to the Sheriff of King County. Prior to the second day

after the murder, Tom still failed to notify anyone of the death of Horace Bright.

SPECIFICATIONS OF ERROR

Under the section entitled "Specifications of Error" as set out in the appellant's brief there are five assignments of error. In that section of the appellant's brief entitled "Argument" there are three assignments of error. The errors assigned under the section "Specifications of Error" are not the same as those discussed under the section "Argument." Therefore, in the appellee's brief only those assignments of error which are listed under the section "Argument" in the appellant's brief will be considered.

ARGUMENT

I

The first specification of error as set out in Section I of appellant's brief reads as follows:

"The trial Court, in permitting the prosecution to introduce on cross-examination of Virginia Kelly, the wife of the appellant, evidence that appellant had beaten her, committed plain error because:

1. Evidence of an independent crime not related to the charge being tried is inadmissible;
2. The prosecution is not allowed to introduce into evidence testimony concerning the character of the appellant prior to the latter having put his character in issue;

3. Evidence of individual acts of misconduct on the part of the appellant not related in any manner to the crime with which he is charged is inadmissible."

The appellant's attempts to bring his Specification of Error No. 1 within the exception to the general rule that errors committed at the trial and not called to the trial Court's attention are not subject to review. To prove the exception he cites:

United States v. Atkinson, 297 U.S. 157;
Suhay v. United States, 95 F. (2d) 890 (10 Cir.);
Arwood v. United States, 134 F. (2d) 1007 (6 Cir.);
Moore v. United States, 161 F. (2d) 932 (5 Cir.);

The Courts in the cited cases all recognized that in exceptional cases where justice requires they may reverse, notwithstanding no objection was made, and no exception taken. While recognizing this ruling, in none of the cases cited did the Appellate Court reverse.

In *Moore v. United States* the Court said on Page 933:

"When a defendant is convicted, as appellant here was, on a fair charge and on a trial containing no objections or exceptions to its course and conduct, only the strongest kind of showing that justice has miscarried will avail him. The record is brief, the testimony in what was said and done and in its implications is clear, simple and direct, and it certainly cannot be said that

it was a manifest miscarriage of justice to convict upon its showing. No reversible error appearing, the judgment is affirmed”.

Also in *Arwood v. United States* the Appellate Court, while recognizing the exception to the rule, refused to reverse on claimed error of introduction of other crimes since they were explanatory of the appellant's defense. Appellant appealed from a conviction of first degree murder and complained, as in the instant case, of error due to the fact that on cross examination of a defense witness, testimony of a prior felony attributed to appellant was elicited. The Circuit Court held that this was not reversible error in the light of appellant's defense which was that he was of low and irresponsible mentality. The Suhay case and the Moore case referred to later had similar holdings.

The theory of appellant Kelly was self-defense and defense of his mother. Many witnesses testified to the character of the deceased to establish his reputation for violence and turbulence. This could have only one purpose, that is to establish that the appellant knew of the deceased's reputation for violence, and that this knowledge created in him a “state of mind” in which he personally feared the deceased, or in which he feared for his mother's safety. The cross

examination complained of by appellant was proper rebuttal of the direct examination of Virginia Kelly. The pertinent part of the direct examination and the remarks of the Court to objection of Government counsel omitted from the appellant's brief and the pertinent cross examination is as follows: Tr. Pg. 166

DIRECT

"Q. Mrs. Kelly, you say Tom knew of the general reputation of Mr. Bright for violence of peacefullness?

A. Yes, he did.

Q. And what was his understanding of that reputation, as to whether it was good or bad?

A. It was bad.

Q. I did not hear you.

A. You mean Horace's reputation?

Q. Yes, Horace Bright's reputation.

A. Horace's was bad.

Q. Tom's understanding of his reputation was, then, that he was a violent man?

A. Yes, that he was a violent man.

* * * *

Tr. pg. 168

Q. Now, Virginia, do you remember of any occasions on which Horace Bright exercised violence toward Mrs. Bright in the presence of Tom?

A. Yes, he has. Yes, I saw him, and Tom saw

him several times beat up on his mother.

Q. Can you tell us of any of those occasions?

A. One time we were staying in Lapush.

* * * *

Tr. pg. 169 to 171

Q. What did he do?

A. Oh, he beat her up and gave her a black eye, and knocked her down on the bed and slapped her and everything.

Q. Was Tom present at that time?

A. Yes. We were in the kitchen, and he saw it.

Q. Now, Virginia, do you know of any other times that the deceased, Horace Bright, ever made any violent threats toward Mrs. Bright in the presence of Tom or within his hearing?

A. Well, he did at one time when we were all staying together at Lapush.

Q. *Were those threats made in the presence of Tom?*

A. *Yes, but Tom never thought anything of them.*

MR. EVANS: I did not understand.

Q. You say Tom didn't think anything of them?

A. Yes.

Q. Why not? Do you know?

A. No, I do not.

Q. When were those threats made, do you remember?

A. That was in 1945, too.

Q. That was in 1945, also?

A. Yes.

Q. Do you remember what the threats were?
The words?

A. The words?

Q. Yes, the words or the meaning.

MR. EVANS: I am going to object to this because she said Tom did not think anything of it.

MR. JOHNSON: Your Honor, I submit that while he might not have thought anything of it at the time, continued actions of the decedent would confirm it.

THE COURT: I will allow the question to be answered. The jury understands the fact that the Court allows certain testimony to be introduced does not mean that the Court does or does not believe the testimony is true. It will be for the jury to determine after they have heard all the evidence and had opportunity to compare all the evidence, written evidence and oral evidence.

It will be for them to determine, first, whether the testimony is true or not, and, second, whether the Defendant believed it or not. The witness may testify, and after it is heard by the jury it will be for the jury to determine how much or little weight to give to it.

Q. Do you remember what the threats were, the words?

A. He just said he was going to kill Mrs. Bright. When he was mad, — I don't know what he was angry about, but he was taking

it out on Mrs. Bright, and he said he was going to kill her for it.

Q. Do you know of any other occasion at any time the deceased ever threatened in the presence of Tom or within his hearing to kill Mrs. Bright.

A. The time we were staying at Ross Campbell's berry patch.

* * * *

CROSS EXAMINATION

Tr. pg. 172

By MR. EVANS:

Q. Now, Mrs. Kelly, on how many occasions has Tom seen Horace Bright use violence toward his mother, Ivy, to your knowledge?

A. Oh, quite a few times.

Q. Do you know how many?

A. I wouldn't know exactly.

Q. It was a common occurrence, wasn't it?

A. Why yes, it was.

Q. Now, the time in 1945 when Horace made some remarks, as you say, that he was going to kill Ivy, did Tom do anything about it then?

A. Yes, he stopped his father from beating her up.

Q. What did he do?

A. He told his father to leave his mother alone, that he loved his mother, and he did not want her to be hurt.

Q. Did he try to force him to stop?

A. No, he told his father to leave his mother alone, and Horace stopped fighting his mother and said, "All right, son."

* * * *

Tr. pg. 174

Q. As a matter of fact, there have been times when Tom has beat you, hasn't there?

A. Yes, we just had family quarrels.

Q. The answer is yes?

A. (No response.)

Q. As a matter of fact, a great many Indian men beat their wives, don't they?

A. I guess they do.

Q. There is nothing unusual about it, is there?

A. No, there isn't.

Counsel says "No objection was taken to the introduction of this evidence, and no exception was taken to its admission." He fails to mention however, that on the day after the evidence was introduced, the Court said (Tr. page 211, line 25, to page 212, line 3):

"Mr. Johnson, is it your position that I have made any mistake in ruling in this trial other than the denial of your motion for dismissal at the end of the Government's case?

MR. JOHNSON: No, it is not. That is the only exception I have taken to the Government's ruling.

THE COURT: If there were any error you felt

I have made in ruling on the admission of evidence, I would listen to you now, and in the event you convinced me I had been in error, I would give you an opportunity to put in what you think I should.

MR. JOHNSON: No, I have no objection in that regard." (Tr. 212)

After testimony as to the knowledge of the appellant of the violent reputation and utterances of the deceased, in order to show the appellant's state of mind, it is proper to cross examine concerning the actual effect of the knowledge on this state of mind. "The state of a man's mind is as much a fact as the state of his digestion," *Edgington v. Fitzmaurice*, L. R. 29, Ch. D. 459, and when evidence as to the state of mind is introduced, it is a proper subject of cross examination. The answer of Virginia Kelly that the accused thought nothing of the deceased's threats, though made in his presence, makes proper cross examination explaining such a mental condition.

Wharton's Criminal Evidence, Vol. 1, 11th Edition, Sec. 339, page 480, gives a concise definition of the evidence admissible to prove self-defense:

"Proof of the dangerous character of the deceased, known to the defendant, and *affording him reasonable grounds for belief that he was in imminent danger of death or great bodily harm* at the hands of the deceased to be averted only by the taking of life, is relevant."

The rule that testimony concerning another crime is inadmissible has many exceptions. To quote again from Wharton's Criminal Evidence, Sec. 345, pages 488-489:

"Any difficulty as to the admission of evidence which shows, or tends to show, the commission of another crime disappears if the evidence is considered strictly upon the grounds of its relevancy to the issues on trial, provided the evidence of other acts is not used to prove the *corpus delicti*. If evidence is competent, material, and relevant to the issues on trial, it is not rendered inadmissible merely because it may show that the defendant is guilty of another crime. Such evidence is not admitted because it is proof of the other crime, but because of its relevancy to the charge on trial."

One of the exceptions to the general rule of admissibility of other acts of misconduct is evidence rebutting a special defense, in this case, self-defense. To sustain a plea of self-defense the accused must show that he actually apprehended danger and that he acted upon such apprehension. The word "apprehend" as used in this connection is not synonymous with fear, but with *belief*. Wharton's Criminal Evidence, Sec. 327, Page 450.

The appellant quotes at length from the case *United States v. Modern Reed and Rattan Company*, 159 F. (2d) 656, in support of the general rule that evidence of other crimes than the one in the indict-

ment are inadmissible. In that case the evidence of the prior crime was made the basis of the Government's case and was alleged as such in the opening statement of the Government's counsel. In the Modern Reed case, *supra*, it was apparently thought by all concerned that proof of prior conviction was necessary to establish the charge in the indictment. The case is no precedent for the present complaint of appellant.

In *Johnston v. United States*, (C.C.A. 9) 22 F. (2d) 1, the Circuit Court said at page 5:

"The general rule is unquestioned that, when a defendant is put on trial for one offense, evidence of a distinct offense unconnected with that laid in the indictment is not admissible. * * *

It is difficult to determine which is the more extensive, the doctrine or the acknowledged exceptions. * * *

Evidence which is relevant is not rendered inadmissible because it proves or tends to prove another and distinct offense. *Astwood v. U. S.* (C. C.A.) 1 F. (2d) 639; *McCormick v. U. S.* (C.C.A.) 9 F. (2d) 237; *Tucker v. U. S.* (C.C.A.) 224 F. 833; *Lueders v. U. S.* (C.C.A.) 210 F. 419. * * *

Also in *Moore v. United States*, 150 U.S. 57, 37 L. ed. 996, the Court held that evidence is admissible in a criminal action which tends to show motive, although it tends to prove commission of another offense by the defendant. Also in *Means v. United States*, 65 F.

(2d) 206, the Appellate Court refused to reverse a criminal conviction on the ground that the evidence showed prior convictions of the defendant even though he did not take the stand or put in any defense. The Circuit Court in this case quoted from the Moore case.

In the case of *Suhay v. United States*, 95 F. (2d) 890, cited by appellant, the defendant had been convicted of first degree murder. The Court admitted evidence of prior crimes and one of the grounds for appeal was that admission of this evidence was prejudicial. The Court, on page 894, quoted the general rule of admissibility of other crimes and then went on to say:

“But relevant evidence which tends to prove a material fact should not be excluded merely because it shows or tends to show that the accused committed another offense at a different time and place. The test in measuring the admissibility of evidence is whether it is material to any issue in the case on trial. If so, it should not be rejected even though it establishes the commission of another crime. The evidence relating to the offenses committed in New York was material upon the question of motive for the homicide.”

The other cases in support of this principle are too numerous to quote.

Since the entire plea of self-defense or defense of his mother rests on the knowledge of appellant of

the violent and turbulent character of the deceased and his belief therein, and his apprehension of danger due to such character, evidence on cross examination rebutting or explaining direct testimony of his belief or lack thereof is relevant and proper. The fact that such cross examination elicits misconduct is within the exception to the general rule, and is not error.

II.

Under section II of the Argument as set out in appellant's brief, four errors are claimed. As set out in the preamble to Section II of the Argument these four claimed errors are as follows:

1. The Government failed to prove deliberation and premeditation beyond a reasonable doubt.

2. The trial Court made reversible error in failing to grant appellant's motion for directed verdict on the first degree homicide charge.

3. The trial Court further erred in submitting the issue of first degree murder to the jury.

4. The trial Court erred in not granting appellant a new trial on grounds Nos. III and IV of its motion alleging that verdict was contrary to the weight of the evidence and was not supported by substantial evidence.

As to the first error claimed above by appellant it is conceded in appellant's brief that the evidence must be considered in the most favorable light for the Government in determining whether or not there was sufficient evidence on the question of deliberation and premeditation upon which the jury could find beyond a reasonable doubt that such elements of the crime were present.

At the close of the Government's case, the evidence thus far adduced, which if believed, proved the following facts:

1. Tom Kelly stabbed Horace Bright to death. (See copies of Tom Kelly's signed statements, Exhibits 1 and 2, attached hereto in the Appendix.)

2. Tom Kelly fled from the scene of the crime.

3. Tom Kelly inflicted eight stab wounds on the body of Horace Bright. These stab wounds were in such places on the body of Horace Bright that it would have been physically impossible for Tom Kelly to have inflicted them all unless at least part of the time he was attacking Horace Bright from the rear. (See reproduction of Exhibits 3, 4, 14 and 15 attached hereto in the Appendix.)

4. Horace Bright was a strong man, being ap-

proximately 6 feet tall and weighing approximately 185 pounds.

5. The wounds on Horace Bright's body are not the slashings which would be the result of a wild, frenzied attack, but are just large enough to allow the knife blade to enter the body, indicating a cool, deliberate, premeditated attack by Tom Kelly.

At the close of all of the evidence, the following additional facts had been established:

1. Tom Kelly is right-handed and was holding the hunting knife in his right hand while he was stabbing Horace Bright (Tr. 240 and 249). From these facts it is clear that the wounds in the upper right arm, right breast and under the right armpit were inflicted while Tom Kelly was attacking Horace Bright from the rear. It is physically impossible for these wounds to be inflicted by a shorter man attacking a taller man from any position except from the rear.

2. Tom Kelly confessed to first degree murder when he testified that after Horace Bright dropped his knife he kept right on stabbing until Horace Bright dropped.

"Q. What happened after you stabbed him?

A. He dropped his knife and hung on to me,

and I kept cutting him up.

Q. How was that?

A. When I first cut him, he grabbed hold of me, and I kept on cutting him.

Q. He dropped his knife?

A. Yes.

Q. And you kept right on cutting?

A. Yes.

Q. How close were you to him?

A. I was close enough to get blood all over myself; right against me.

Q. Was he trying to hold himself up?

A. Yes, he tried to hold himself up after he was cut.

Q. And you kept right on cutting?

A. Yes.

Q. Do you remember how many times you cut him?

A. No, I don't.

Q. Did you change hands with your knife?

A. No, I never.

Q. Did you ever get behind him?

A. I don't know if I did or not.

Q. How long before he dropped to the floor, if he ever dropped to the floor?

A. He dropped after I got away from him.

Q. In other words, you pulled away from him, and he dropped to the floor?

A. Yes."

3. Tom Kelly is approximately 5 feet 6 inches tall and weighs approximately 155 pounds.

4. Horace Bright was not only a strong man, but a fighting man, capable of taking care of himself in a fight.

5. Tom Kelly was not hit, cut, or in any way injured as a result of the assault on Horace Bright.

From the above evidence, it is clear that the jury was not only entitled to find beyond a reasonable doubt that the elements of deliberation and premeditation were present but were virtually compelled to find deliberation and premeditation. From the above evidence it is clear that had Horace Bright, a strong, fighting man been facing Tom Kelly with a knife in his hand, he would have inflicted some wounds upon Tom Kelly during the course of the struggle, if any struggle actually took place. If there had been any struggle between Tom Kelly and Horace Bright, the stab wounds would have certainly been in the nature of slices or slashes rather than puncture holes just large enough to admit the knife blade. From the evidence in this case, the jury was entitled to find and believe beyond a reasonable doubt that Horace Bright was either attacked from the rear or under

such conditions as would render him completely helpless. These physical facts show that this homicide could only have been committed by an assailant who had deliberately pre-planned his attack.

The second claim of error under Section II of the Argument as set out in the appellant's brief reads:

“The trial Court made reversible error in failing to grant appellant's motion for direct verdict on the first degree homicide charge.”

It is assumed that the appellant is referring to the motion made at the close of the Government's evidence which is set out on pages 105, 106, 107 and 108 of the Transcript of the Proceedings. In that motion, the only challenge which was made was as to the sufficiency of the evidence to prove the cause of Horace Bright's death. Counsel for the appellant argued at that time that the doctor who testified as to his examination of the body of Horace Bright did not testify conclusively that the victim died as a result of the stab wounds. The Court overruled this motion for the reason that the doctor had testified that in his opinion the stab wounds were the cause of Horace Bright's death and further Tom Kelly in his signed statements which were then in evidence stated, “I know that I killed him”.

This was the only motion throughout the entire

trial which was made by counsel for the appellant. Even if counsel for appellant had made a motion such as claimed in the second assignment of error in Section II of the Argument, the same would properly have been denied in view of the evidence which had been adduced up until that time as heretofore discussed.

The appellant thereafter offered evidence, thus waiving the challenge to the sufficiency of the evidence at the close of the Government's case. The case of *Mosca v. United States* (9 C.A.) 174 F. (2d) 448, states in effect that where a defendant challenges the sufficiency of the evidence in the close of the Government's case and thereafter offers evidence in his own behalf he thereby waives such motion for purposes of appeal.

The third assignment of error as set out in Section II of the argument in appellant's brief reads:

"The trial Court further erred in submitting the issue of first degree murder to the jury."

The Transcript of Proceedings fails to reveal that any motion whatsoever was made at the close of all of the evidence. Therefore, under the ruling in the case of *Mosca v. United States*, 174 F. (2d) 448, this court will not review such a motion for a judgment of acquittal made for the first time upon appeal.

However, if this court does choose to consider such a motion, the argument heretofore made in answer to appellant's first and second assignments of error under Section II of the Argument as set out in the brief is likewise an answer to the appellant's motion.

The fourth assignment of error set out in Section II of the appellant's argument is that the trial Court further erred "in not granting appellant a new trial on grounds Nos. III and IV of his motion alleging that the verdict was contrary to the weight of the evidence and was not supported by substantial evidence." The United States Supreme Court has repeatedly held that the overruling of a motion for a new trial is not assignable as error. In *Wheeler v. United States*, 159 U. S. 523, 40 Law. Ed. 244, the United States Supreme Court stated:

"Another contention is that the Court erred in overruling the motion for a new trial, but such action, as has been repeatedly held, is not assignable as error. *Moore v. United States*, 150 U. S. 57; *Holder v. United States*, 150 U.S. 91; *Blitz vs. United States*, 153 U.S. 308."

The *Wheeler* case just quoted was an appeal from a murder conviction where the defendant had been sentenced to be hanged. For other cases with like holdings, see *Clune v. United States*, 159 U.S. 590, 40

Law. Ed. 269, and *Lueders v. United States* 210 Fed. 419 (9 C. A.).

III.

The assignment of error as set out in Section III of appellant's brief states: "The trial court erred in failing to grant appellant a new trial on the ground that he did not have a fair and impartial trial because * * *."

Again, it is pointed out that the denial of his motion for a new trial can not be reviewed as error by the Appellate Court (See *Wheeler vs. United States*,, Supra).

The first three errors assigned under Section III of the argument in appellant's brief pertain to claims of error in the instructions. As shown by the Transcript of Proceedings, after the close of all the evidence the Court had a discussion with counsel on both sides regarding the proposed instructions. At the close of that discussion the following proceedings took place:

MR. JOHNSON: "None, Your Honor. For the sake of the record, while I made my objection and took an exception to giving instructions on the self defense matter, I would like it noted that I have a specific objection to the Court's failure to give the

defendant's requested instructions Nos. 2, 3, 4 and 5."

THE COURT: "Well, Counsel, after both sides have argued, I will instruct the jury. After I have instructed the jury you will have the opportunity of excepting to the instructions I give, the opportunity of excepting to the refusal of the instructions you requested, that is, you will be given opportunity to except to my refusal to give them. And you are privileged to except now, but that will not foreclose you hereafter, and I may tell you that I don't think you can depend on your present exceptions. In order to have your exceptions really valid, you should repeat them." (Tr. 295, 296).

After the Court had instructed the jury the following proceedings took place:

THE COURT: "Very well. Any exceptions by the defense?"

MR. JOHNSON: "I would except to the instruction on turbulence, which I think was very excellent as far as it went, but I think it should have touched on the matter concerning the overt act of a man with a known dangerous reputation and that such reputation justifies quicker action on the part of the killer in defending himself. I think that should have been considered."

THE COURT: "All right. Any others?"

MR. JOHNSON: "Also on the instructions as to the right of one to act in defense of another. I felt they were very good as far as they went, but it seemed to me that they should have been a little clearer. I beg your pardon, that was corrected afterwards."

THE COURT: "Yes, I covered it."

MR. JOHNSON: "Yes."

It is plain that the appellant took no exceptions to the Court's instructions as is now assigned as error despite the Court's previous admonition to counsel for the appellant so to do.

Thereafter, on April 8, 1949, after counsel for the appellant had made an argument in support of his motion for a new trial, the following proceedings took place:

THE COURT: "In the cause of *United States vs. Thomas Kelly*, the Defendant, through his Counsel, has moved for a new trial. Counsel has advised the Court that he is depending upon grounds two and three of the motion. I would assume, although it has not been expressly stated, — I would assume from the argument that Counsel has no objections to the instructions given, but feels that the jury's verdict

under the evidence was in contradiction of the instructions. Am I right?"

MR. JOHNSON: "That is correct, Your Honor."

THE COURT: "While the Defendant has not stressed the first ground of the motion, that the Court erred in denying Defendant's motion for an acquittal made at the conclusion of the evidence, I assume that the Defendant still depends upon that ground, —

MR. JOHNSON: "Yes, Your Honor."

THE COURT: — "for such value as it may have."

MR. JOHNSON: "Yes, Your Honor."

THE COURT: "In other words, this motion is now presented to the Court primarily upon grounds two and three of the motion and also, secondarily, upon ground one of the motion. The fourth ground is not urged."

MR. JOHNSON: "No, Your Honor."

From the foregoing it is clear that counsel for the appellant is satisfied that the instructions as given were correct and the assignments of error as to the instructions contained in the appellant's brief are not made with sincerity.

The first error assigned under Section III of the argument in the appellant's brief reads as follows:

"Instructions defining the elements of the crime submitted to the jury are erroneous and lack statements that under the evidence should have been submitted to the jury."

The argument in the appellant's brief addressed to this assignment of error centers upon the following words used by the trial judge in defining murder in the first degree:

"The deliberate purpose to kill is sufficient to constitute deliberation, and premeditation and the actual killing may follow each other as successive impulses or successive thoughts of the mind."

The appellant's brief then goes on to quote from cases decided in jurisdictions other than the Ninth Circuit.

The trial judge in the case at hand is bound by the decisions of the Court of Appeals for the Ninth Circuit. The law in the Ninth Circuit on this subject is set out in the case of *Paddy vs. United States* reported in 143 F. (2d) 847 (Cert. denied, 324 U.S. 855), wherein the following instruction is quoted as being proper:

"By 'deliberate and premeditated' as used in the

indictment is meant that the idea of killing must have been conclusive and intended before the act which produced death; namely, the shooting. * * *. The deliberate purpose to kill, and the act in execution thereof may follow each other as rapidly as successive impulses or thoughts of the mind; it is enough that the purpose and the intent to kill preceded the act. * * *."

The Court of Appeals for the Ninth Circuit then goes on to state:

"Malice to be premeditated does not require the premeditation of the cloister."

The instruction in the Paddy case was quoted and approved by the Court of Appeals for the Ninth Circuit in the case of *Schokley vs. United States* reported in 166 Fed. (2d), 704 at page 716. The Schokley case was decided exactly a year and a day prior to the time the trial judge in the case at hand gave his instructions. (Cert. denied in the Schokley case, 334, U.S., 850).

The attention of the Court is invited to the actual words used in the instructions in the Paddy case as compared with the words as used by the trial judge in the case at hand. It will be found that the trial judge's instructions were virtually verbatim with those used in the Paddy case.

The trial judge in the case at hand, being bound by the decisions of the Court of Appeals for the

Ninth Circuit, gave the correct instructions on the subject of premeditation and deliberation. Cases decided in other districts are not binding upon the trial judge in the case at hand and are not helpful to the appellant.

The jury found the appellant guilty of murder in the first degree. Therefore, any discussion of any claim of error as to the instructions on voluntary manslaughter would serve no useful purpose. However, in this regard, it is pointed out that the appellant's brief fails to quote all of the trial judge's instructions on voluntary manslaughter. The instructions which followed those quoted on pages 64 and 65 of the appellant's brief are as follows:

“Voluntary manslaughter requires an intent to kill, but the intent may be acquired as a result of a sudden quarrel or in the heat of passion and must be without deliberation.”

The second assignment of error as set out under Section III of appellant's argument states:

“The trial court's charge to the jury contain comments on the evidence highly prejudicial to the defendant.”

It must be conceded that the trial judge has the right to comment upon the evidence. The only question upon the trial judge's right to comment upon the evidence is that it must be made clear to the jury that

they are the actual triers of the facts and that they are not bound by the comments made by the trial judge. This was done in the case at hand with more particularity than is required. On page 300 of the Transcript of Proceedings the trial judge stated to the jury:

"I will say this now, and I will say it to you again. You are the jury. The responsibility is yours in determining the guilt or innocence of the defendant and as to the particular offense the defendant is guilty of if you find him guilty. You are not bound or controlled by what you think I think as to the guilt or innocence of the defendant. You are not bound or controlled by what I may believe as to the truth or lack of truth of the testimony of any witness. You are likewise not bound by what you think I think as to what witnesses should be believed or not believed. Such again are your responsibilities. If you have an idea a certain witness told the truth, you should accept the testimony of that witness regardless of whether you think I personally might think the witness was not worthy of belief. Follow your views and not mine."

Again, on page 326 of the Transcript of Proceedings the trial judge in instructing the jury stated:

"Nothing in my instructions is intended to indicate what your verdict should be. Nothing in my instructions is intended to indicate that you should or should not return any particular verdict. The responsibility is yours, and you can only be honest good American citizens by returning the actually correct verdict regardless of the verdict you might like to return."

Again, on page 342 of the Transcript of Proceedings the Court in instructing the jury stated:

“You are the sole and exclusive judges of the weight and credibility to be allowed the testimony of the several witnesses and each of them, both for the Government and for the defendant.”

By the above quoted instructions the trial court clearly instructed the jury that they were not bound by the trial judge's comments on the evidence if any such comments were made.

The third assignment of error contained in paragraph III in the appellant's brief states:

“The instructions contain arguments in favor of the prosecution and omit a fair statement of appellant's theory of the case.”

The appellant in his brief complains that the trial judge did not single out the details favorable to the defendant and analyze the same for the jury. The trial judge is not required to make an argument to the jury for either side.

In the case of *Arwood vs. United States* (6 Cir.) reported in 134 Fed. (2d) 1007, the defendant was convicted of murder in the first degree. On page 1011 the Court states:

“In the argument the court's charge was criti-

cized. It was contended that the court did not analyze the evidence and apply the law thereto. This complaint is made here for the first time. There were no objections to the general charge or specific requests to summarize the evidence. Ordinarily the criticism would come too late, but this is a capital case and we consider it. See *Max Stephan v. United States*, 6 Cir., 133 F. (2d) 87, decided by us February 6, 1943. The particular contention is, that because it was possible under the indictment for the jury to have returned a verdict upon either of the degrees of offenses embraced thereunder, the court should have stated the evidence in detail and instructed the jury under what state of facts, if found by them, the appellant would have been guilty of either of these offenses.

“We do not think the charge susceptible to the criticism. The Court instructed the jury, ‘You jurors are the sole judges of the evidence, also the judges of the law as applies to the facts in the case, but cannot disregard the law as given you by the court,’ and pointed out with commendable clarity and in meticulous detail the elements which constitute the offenses of murder in the first degree, murder in the second degree, voluntary manslaughter, and even involuntary manslaughter, and followed all this with the statement ‘I have given you the distinguishing characteristics of the four grades of felonious homicide embraced in this indictment.’

“The court then instructed the jury that if it found the appellant guilty beyond a reasonable doubt it was the duty of the jury to decide the grade of offense of which he was guilty. More than this was not required. We must assume that the jury were men of intelligence and sound

judgment and that they were able to comprehend the charge.

“In *Stilson v. United States*, 250 U.S. 583, 588, 40 S. Ct. 28, 30, 63 L.Ed. 1154, it was said: ‘3. It is contended that the court did not analyze and discuss the details of the evidence. The trial judge left matters of fact to the determination of the jury in a charge commendable for its fairness. Certainly the lack of discussion in detail does not amount to a valid objection; particularly in the absence of any specific request for comment upon any special phase of the testimony.’”

The law as stated by the United States Supreme Court in the *Stilson* case, which is contained in the quote above from the *Arwood* case, is binding and controlling upon this court. The appellant cannot complain that the trial judge did not make an argument to the jury in the appellant's favor.

The fourth assignment of errors under Section III of the appellant's brief states: “Exhibit 18 should not have been admitted.”

Exhibit 18 is attached hereto in the Appendix, the same being a signed statement made by the appellant's mother, Ivy George, on October 27, 1948. In Exhibit 18 the witness, Ivy George, stated, “He started toward me with the knife and tried to strike me with it.” On cross examination Ivy George testified to the effect that she did not see a knife in Horace Bright's hand until after Horace Bright had

beat her with his fists, and further denied on cross examination that Horace Bright ever tried to strike her with a knife. These are certainly contradictory statements and the admission of Exhibit 18 could not have been error.

CONCLUSION

The appellant in this case complains that he did not have a fair trial. The Court's attention is invited to the summary of the entire trial given by the trial Judge at the conclusion of the appellant's argument for a new trial, starting on page 378 of the Transcript of Proceedings and concluding on page 390. As the trial Judge pointed out in that comment, both the Government and the trial Judge leaned over backwards to give the appellant a fair trial. The Court admits that several errors were made in favor of the appellant and concludes with this statement: "I think the jury tried to give this young Indian man a fair trial. I think the jury was unable to explain the wounds except on the basis that the defendant was guilty as charged. The jury has that right. I don't think the jury made a mistake."

In concluding, it is respectfully submitted that the trial Judge committed no errors in the conduct of the trial and that the defendant was properly and

fairly tried and convicted, and the Judgment of Conviction should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney

VAUGHN E. EVANS
Assistant United States Attorney

HARRY SAGER
Assistant United States Attorney

Office and Post Office Address:
1017 United States Court House
Seattle 4, Washington

APPENDIX

EXHIBIT 1

"City-County Bldg.
Seattle, Wash.

10-27-48 1:17 PM

"I, Thomas Kelly also known as Thomas Bright make the following voluntary statement to John Carl Netter and James Dunphy who have identified themselves to me as Special Agents of the FBI. I have been told that I do not have to make this statement and that it can be used in a court of law against me. No threats, promises or duress have been used to obtain this statement. I have been advised of my right to have an attorney-at-law present.

"I, Thomas Kelly, am twenty three years old having been born June 10, 1924, at Oakville, Washington, and have a seventh grade education. On October 24th at about 9 PM my mother, Ivy George Bright, my father, Horace Bright, and a friend Charlie Sailto and myself went to Forks, Wn. and secured some liquor. We were driving in Charlie Sailto's car and he left after bringing us home.

"My mother, father and myself went into the house and continued to drink the liquor. Between midnight and one o'clock in the morning of the twenty-sixth of October my father began to get mean with my mother. I told him not to be mean to her. He got mad at me and went into his bedroom and got his hunting knife and was going to cut me with the knife. I grabbed my knife from the window sill and I stabbed him with my knife. I don't know where I stabbed him. After I stabbed him he dropped his knife. All this happened in the front room of Lavin Coe's house on the LaPush Indian Reservation, LaPush, Washington.

"I know that I killed him.

"I next dragged him to his bed and left him there. I never notified anyone.

"I have read this statement and it is true. I have initialed the first page and signed the second page.

/s/ "Thomas Kelly

"Witnesses: Oct. 27, 1948 2:00PM

/s/ John C. Netter, Special Agent FBI

/s/ Special Agent James Dunphy
FBI 2:01 PM 10/27/48 "

EXHIBIT 2

"10-28-48 10:12 AM
Sheriff's Office
City County Bldg.
Seattle, Wn.

"I, Thomas Kelly also known as Thomas Bright, make the following voluntary statement to James Dunphy and John C. Netter who have identified themselves to me as Special Agents of the FBI. No threats, promises, or duress have been used to induce me to make this statement and I have been told that I do not have to make this statement and, that if I do make this statement that it can be used against me in a court-of-law. I have been advised that I have a right to have counsel present.

"I am twenty-three years old and was born in Oakville, Washington, on June 10, 1924. I have completed about six and one half years of schooling. I went to school at Taholah, Washington, then I was sent to the Cushman Hospital at Tacoma, Washington where I continued my schooling and afterwards came

back to Taholah, Washington where I left school to go to work.

"I was sent to Cushman hospital for T.B. However, I don't cough much and feel good at this time.

"I live in Brownstown, Washington with wife's folks. There address is Harrah, Washington, Star Route, Box 145, care of Bill Sampson.

"I married Virginia Edwards September 22, 1943 in Yakima, Washington. We went through no ceremony but just started living together.

"The Sampson family that my wife and I live with are my wife's aunt and uncle. They have two sons living with them and a daughter who is living in Wapato, Washington.

"My mothers maiden name was Ivy Mary Waterman. My mother first married Lewis Kelly and had one child named Ruth. She next married Horace Bright. I was born when she was married to Horace Bright so Ruth is my Step sister. Next my mother married Edward George who died about 1942, after which my mother went back with Horace Bright.

"During the early part of the war I worked for Boeing Aircraft Company both at Tacoma and later at Seattle as a Riveters helper. Since that time I have been employed as a fisherman, picking hops, in the hopp yards and in the bag fields.

"I left Wiley, Washington, Sunday afternoon October 17, 1948 to go to Yakima, Washington. I was picking apples for a person named Snelling in Wiley, Washington.

"At about 6 PM, Sunday, October 17, 1948 I left Yakima, Washington, by buss for Seattle, Washington. I arrived in Seattle, Washington about 11:30 P.M. Sunday night. As there were no ferries running I took in a show near Yessler Way. I saw a

picture where a man thought his brother had turned into a dog. I can't remember the name of the picture. The other picture was named the "Mating of Millie." After I got out of the movie I caught the ferry to Bremerton, Washington. I did not catch the ferry immediately after leaving the movie as I walked to the buss station to get my suitcase which was checked there. I arrived in Bremerton about 8 o'clock in the morning and caught a buss to Skokomish, Washington.

"My mother has a house at Skokomish Washington on the reservation. I was supposed to meet my mother and father there. However, after I got to my mother's house, I found that my father had left about a week before to go up to Lavin Coe's place at LaPush, Washington, to do some fishing. I stayed at my mother's place that night and the next afternoon my mother and I left to join my father. We took the buss from Skokomish, Washington, to Port Angeles. At Port Angeles, Washington, there were no busses running so my mother and I stayed in the Merchants Hotel. This was Tuesday night October 19, 1948 as near as I can figure around 5:30 PM. Left Port Angeles, Washington about 2:30 in the afternoon by buss for Forks, Washington. We arrived in Forks, Washington, about 5:30 or 6 in the evening and we met a friend named Tyler Hobucken and his wife going to a show. My mother and I went to the show with Tyler and his wife and when the show was over Tyler Hobucken took us all home in his car to LaPush, Washington.

"The next day we went fishing in the river. I mean my father and I went fishing. My father and I continued to fish every day thereafter.

"On Monday I fished all day alone. My mother and father went into Forks, Washington, that day.

"I came home after I got done fishing about 5

o'clock and my mother and father got home about the same time. They brought home a bottle of whiskey. I don't know whether it was a quart or a pint. The folks did not appear to have been drinking when they came home.

"Around 6:o'clock my father and I went down to the river to clean the net out. We stayed down there about an hour and then came back to the house.

"I next worked on my dip net and then had some pineapple for supper.

"Going back just a bit, I remember that my mother, father and myself drank about half the bottle they brought back from town before we went down to clean out the net.

"My father then wanted to go back to Forks, Washington to get some more liquor. The three of us walked over to Charlie Sailto's, which is about three blocks, and asked him to take us to town. Charlie agreed to take us to Forks. My father talked to Charlie and I don't know what was said.

"My father and I were not fighting when we were down at the net. I always got along good with my father and mother. My mother and father were getting along all right before they went to town. I have never seen my father stricke my mother. They have had arguments before.

"Charlie Sailto and his wife sat in the front seat of the car. I believe the car was a 1936 Buick. Facing Foward I sat in the right hand side of the car, my mother sat in the middle and my father sat in the left hand side. Like it is in the picture.

(DIAGRAM)

"We finished the bottle on the way to Charlie Sailto's house and threw the bottle in Charlie Howeattle's yard.

“There were no arguments in the car on the drive into Forks.

“We parked the car on a street in Forks and my father got out to go look for a bottle. Everyone else waited in the car. I got out and went over to a tavern to try to get some beer. I had about twenty-five dollars on me at the time. A fellow I met in the tavern who was talking to me about fishing came outside when I did. I asked him to get a gallon of wine for me and gave him \$6.00. He went into the tavern and came out with the wine and gave me some change. There was not much change. I don't know what type of wine it was. This took place in front of the tavern. This fellow asked me if I had any salmon with me. My father came along about this time and told him that there was two salmon at the house for him if he would come for them. My father asked him to go in and get two cases of beer. This stranger made two trips into the tavern and brought out one case of beer each time. My father paid him and I do not know how much money.

“It was dark out when this was going on I would say about 10:30 P. M. This tavern is located right across from the Post Office and next to the taxi stand. The car was parked a block over from the tavern in the opposite direction from the post office. I think it would be a block east of the tavern which is located on the main street in town. They moved the car here after I got out of it as it was parked south of the Post Office.

“We put the beer and wine in the car and drove back to LaPush. On the way back to LaPush everyone in the car had about three to four bottles of beer to drink.

“On the way back I sat in the front seat aside of Charlie Sailto's wife. My father sat on the right hand side coming back.

"Charlie dropped the three of us off at Lavin Coe's house where we were staying. Lavin Coe owned the house where we were staying. He lives at Queets, Washington. Coe is Bright's uncle, I believe.

"It was some where around midnight when we arrived home. Charlie Sailto did not come in.

"My mother, father and myself went into the house and drank some beer. Also, we were passing the wine jug around. I sat on a chair to the right of the front door fixing my small dip net. I was putting a new net on the frame. My mother and father were sitting to the left of the front door at a table.

"We continued drinking until about half the gallon of wine was gone and about half a case beer left.

"My father began swearing at my mother. I do not know what he was mad about. He was getting mean to her. I heard him call her a 'Son of a Bitch'. I got up from the chair to get a bottle of beer and told my father not to be like that. My father told me not to butt in as I was walking over to where my net was.

"My father must have got up as I was returning to my chair. I did not notice him. After I had drank about inch and a half to two inches of beer out of the bottle.

"I next heard my mother scream and noticed my dad about ten feet from me. My father had a knife in his hand. My mother was then standing in the opposite side of the room from the table near a window.

"I jumped up and grabbed my knife from the window sill. The knife was laying on the window sill next to the chair on which I was sitting. This is not the window next to the door.

"See diagram 1-A

"I don't know what position my father had the

knife. I saw the knife in his hand.

"I had had a lot to drink but was not too drunk. My father did not seem too drunk.

"When I seen him with his knife I jumped at him with my knife.

"I know that I cut him. He droped his knife. I don't know where I hit him with my knife.

"I do not know what happened after that. I do not know what my mother did.

"I seen he was dying.

"My mother and I dragged him over to the bed. We both lifted him onto the bed.

"When my father was comming at me I thought that he was going to cut me.

"My mother listened for his heart and said he was dead just after we put my father in bed.

"My mother did not know what to do. I told her to go to Yakima and bring my wife back to Seattle or Tacoma. I told her I was going to give myself up in Seattle or Tacoma.

"I told her to phone up a taxi in LaPush to take her to Forks.

"I gave her about twenty dollars and she left about two dollars in change on the stove for me.

"She left right then.

"I next went over by the stove and went to sleep. The stove is opposite the front door.

"The fight took place about 12 midnight to one o'clock in the morning of the twenty sixth of October.

"I woke up the next morning. I did not know what time it was. I found my knife on the floor near

the stove. My knife is about ten inches long and has a brown leather handle. I use this knife salmon fishing and to repair nets. I did not touch my fathers knife.

"After I woke up I put my knife in my belt and took about twelve or thirteen bottles of beer and about one half a gallon of wine to Harvey James' house. He was still in bed. I was going to ask him for a couple of dollars but he did not have any money. I told him nothing about what had happened.

"I next went to the Post Office and called a taxi at Forks, Washington. It was then about nine o'clock. The taxi took about thirty minutes to get to where I was waiting at the Post Office at LaPush. I took the taxi and got off about a mile outside of Forks at the highway. I walked about three miles before I caught a ride to Port Angeles. The taxi cost four dollars. I started out with five or six dollars. I had change in my pocket beside the change my mother left for me.

"When I got to Port Angeles, I went to the ferry and asked them how much it cost. They wanted two or three dollars and I did not have enough money.

"I went and sold my watch and knife for one dollar. I sold my watch and knife for one dollar to a second hand store about a block from the ferry dock. The watch was a pocket watch made by Ingram.

"I went back down to the dock and got a ticket. Then I waited a few minutes for the boat. The time was about 12 noon or one o'clock. The boat reached Seattle about 6 o'clock at night.

"I came off the boat and walked to Yessler and then around the block. When I was walking around the block I met Charles Howeattle. He was going

to eat and I went in with him. I ordered pie and only ate half of it but, could not hold it down.

"Charles took me up to a hotel and bought me a room.

"This Charles Howeattle is my fathers uncle.

"I did not tell him what happened.

"I stayed in what I believe was the Traverlers Hotel room 36 or 37. I stayed there all night.

"I got up the next morning at seven o'clock and waited until eight or nine o'clock for Charles Howeattle to get up. He was at the same hotel but not the same room.

"I left the hotel and came down to the Sheriff's Office in Seattle and gave myself up.

"What I have told in this statement is true and I am not covering up for someone else.

"I have read this 14 page statement and drawn a diagram and have signed the last page. I have each other page initialed and have initialed all mistakes. This statement is true to the best of my knowledge.

/s/ "Thomas Kelly

"Thomas Bright

Special Agent James Dunphy FBI 10-28-48 5:27 PM

Special Agent John C. Netter FBI 10-28-49 5:27 PM"

EXHIBIT 18

"Wapato, Wash.

Oct. 27, 1948

"I, Ivy George, make the following voluntary statement to A. O. Richards and Eugene P. Clark,

whom I know to be Special Agents of the Federal Bureau of Investigation. No threats or promises have been made to induce me to make any statement and I have been advised this statement may be used in court. I have been advised of my right to consult an attorney before making any statement.

"I have been living with Horace Bright, a member of the Quillayute Indian Tribe, at Lapush, Washington for about four years as his common law wife.

"On October 25, 1948, Horace Bright, Thomas Kelly, my son and Bright's went to Forks, Washington and each of the men bought a case of beer and one also bought a gallon of wine. All three of us had previously been drinking some whiskey and wine purchased earlier in the day by Bright. We returned to Lapush to Bright's home and I started to build a fire and Thomas Kelly started repairing a net in the front room. I first noticed signs of trouble when I heard Bright speaking in a loud tone to Thomas and saw him jerk the net out of Thomas' hands. Bright then threw the net on the floor, and I noticed he had an all metal knife in his hand which is his and which he generally carries in a sheath. He started toward me with the knife and tried to strike me with it. I dodged him for a moment, then when he was still trying to stab me with the knife Thomas Kelly came up behind him and stabbed him in the back with a hunting knife he had been using to repair the net. Bright fell to the floor and Thomas and I dragged him to the bed in the front room and laid him on the bed. Before we moved him, he said to Thomas 'You've got me, son.' He died almost immediately after that. Thomas then asked me to notify his wife Virginia Edwards near Brownstown. I left the house about half an hour later which would be very soon after midnight, leaving Thomas Kelly and the body of Bright there.

"I have read this statement of two pages and it is true.

"Ivy George /s/

"Witnesses:

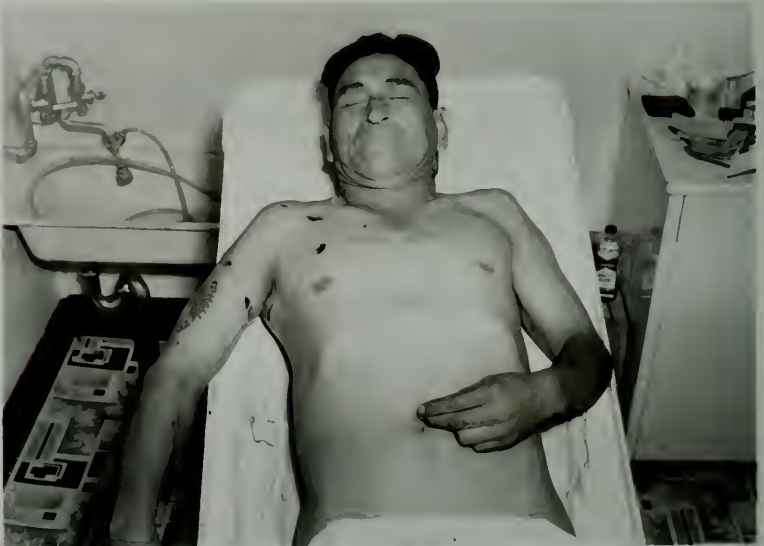
"Eugene P. Clark, /s/, Special Agent F. B. I.

"Amedee O. Richards, Jr., /s/ Special Agent F. B. I.

EXHIBIT No. 3



EXHIBIT No. 4



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EXHIBIT No. 14

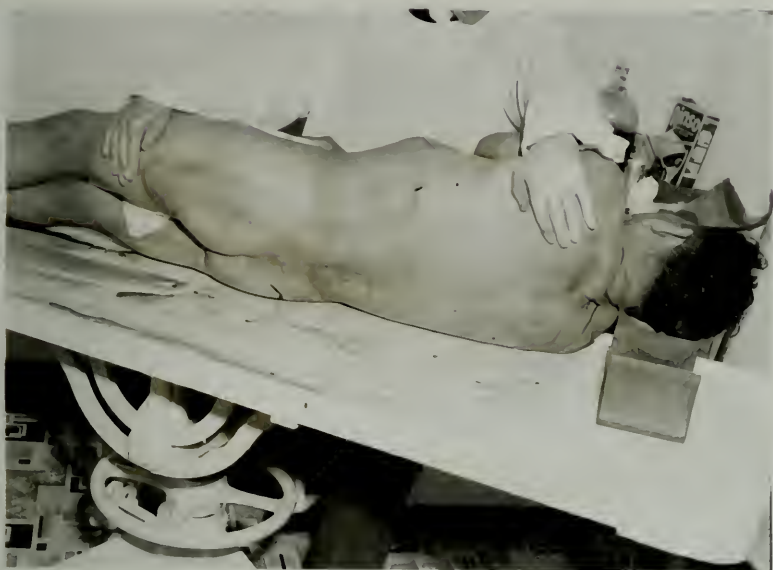
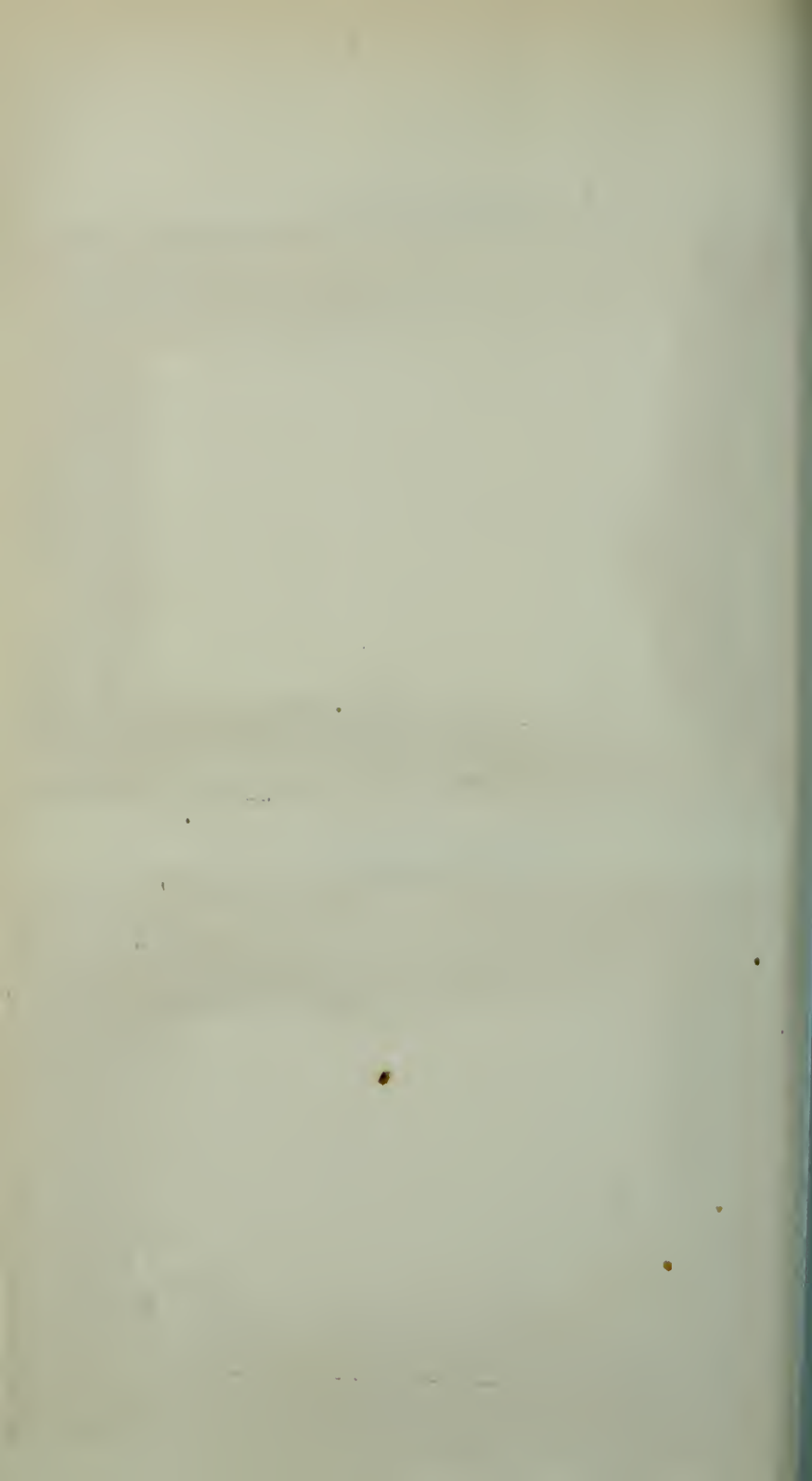


EXHIBIT No. 15





No. 12261

United States
Court of Appeals
For the Ninth Circuit.

COMPANIA ENGRAW COMMERCIAL E. INDUSTRIAL
S. A., a Corporation,

Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION,

Appellee,

and

SCHENLEY DISTILLERS CORPORATION,

Appellant,

vs.

COMPANIA ENGRAW COMMERCIAL E. INDUSTRIAL
S. A., a Corporation,

Appellee.

Transcript of Record

In Two Volumes

Volume I

Pages 1 to 522

Appeals from the United States District Court for the
Southern District of California,
Central Division.

FILED
OCT 25 1949

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant and Cross-Appellee:

STANTON & STANTON,

740 S. Broadway,

Suite 1004-09,

Los Angeles 14, Calif.

For Appellee and Cross-Appellant:

BRONSON, BRONSON & McKINNON,

1500 Mills Tower,

San Francisco, Calif. [1*]

* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the District Court of the United States
for the Southern District of California,
Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E INDUSTRIAL S. A., a corporation,
Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION, a
corporation,
Defendant.

COMPLAINT—BREACH OF CONTRACT

Plaintiff complains of defendant in the above entitled action and for cause of action alleges as follows, to wit:

I.

That jurisdiction is founded upon diversity of citizenship; that plaintiff Compania Engraw Comercial E. Industrial S. A. is a citizen of the Republic of Argentina; that defendant, Schenley Distillers Corporation, is a corporation organized and existing under and by virtue of the laws of the State of Delaware.

II.

That the plaintiff, Compania Engraw Comercial E. Industrial S. A., is now and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of

the Republic of Argentina and having its principal place of business in the City of Buenos Aires, Republic of Argentina. [2]

III.

That said defendant, on or about the 28th day of May, 1945, filed in the office of the Secretary of State of the State of California a copy of its articles of incorporation, duly certified by the Secretary of State of the State of Delaware, together with a statement showing (1) the location and address of its principal office; (2) the location and address of its principal office within the State of California; (3) the name and address of a person within the State of California upon whom process directed to defendant may be served, to wit: John P. Daly, c/o C. T. Corporation System, Mills Building, San Francisco; and (4) its irrevocable consent to service upon said John P. Daly of process issuing from all courts sitting in said State of California, both State and Federal.

IV.

That the contract hereinafter alleged was and is in writing and subscribed by said defendant; that said contract was made and entered into within the County of Los Angeles, State of California, and within the Southern District of California, Central Division thereof; that said defendant has now and at all times herein mentioned has had an office and principal place of business within said County of Los Angeles.

V.

That on or about the 23rd day of May, 1946, a contract in writing was made and entered into by the plaintiff, on the one part, and defendant on the other part, under and by the terms whereof plaintiff agreed to sell and deliver to defendant, and defendant agreed to purchase and receive from the plaintiff, f.o.b. steamship at Buenos Aires, Republic of Argentina, 1135 tons of glucose, made from crystal clear corn syrup and testing between 43° and 45° Baume, at 1.35 Argentine pesos per kilo, packed in wooden cooperage containing approximately 660 pounds each, and delivered to McCormick Steamship Company at Buenos Aires for carriage to San Francisco or Los Angeles, California, under shipping schedule as follows:

50 tons in June, 60 tons in July, 200 tons in August, 150 tons in September, 275 tons in October, 200 tons in November, 200 tons in [3] December; all in the year 1946;

and further agreed to make payments for the total purchase price of said glucose on or before the 30th day of October, 1946, at the rate of 335.82 Argentine pesos to 100 American dollars, and thereby defendant agreed to pay to said plaintiffs the sum of Five Hundred Thirty-two Thousand, Four Hundred Forty and 83/100 (\$532,440.83) Dollars; that a true and correct copy of said contract is hereto attached, marked "Exhibit A," and hereby specifically referred to as if herein set forth at length.

VI.

That plaintiff purchased in the Buenos Aires, Argentina, market said 1135 tons of glucose made from crystal clear corn syrup and testing between 43° and 45° Baume, at a price of 1.20 Argentine pesos per kilo for steamship deliveries as specified in said contract, more particularly alleged in paragraph V hereof, to wit: a total purchase price of Four Hundred Eighty-one Thousand, Nine Hundred Thirteen and 91/100 (\$481,913.91) Dollars; that said purchase contracts were for delivery F.A.S. Buenos Aires, Argentina; that the customary and fair cost of loading on board ship said glucose under said f.o.b. contract with said defendant is and would be the sum of 50 centavos per kilo; that is, a total cost of stevedoring for said 1135 tons of glucose changed from F.A.S. to f.o.b. delivery in the sum of Fifteen Thousand, Eight Hundred Forty-one and 22/100 (\$15,841.22) Dollars; that the net profit accruing and to accrue to plaintiff is and would be the sum of Thirty-four Thousand, Six Hundred Eighty-five and 72/100 (\$34,685.72) Dollars.

VII.

That on or about the 7th day of June, 1946, defendant repudiated said contract and notified said plaintiffs by telegram to proceed no further therewith.

VIII.

That plaintiff has suffered damage at the hands of said defendant by reason of defendant's repudia-

tion of said contract in the sum of Thirty-four Thousand, Six Hundred Eighty-five and 72/100 (\$34,685.72) Dollars as the net profit under said contract. [4]

IX.

That in addition to the loss of profits as hereinbefore alleged said plaintiff has suffered and will suffer estimated loss, directly and naturally resulting in the ordinary course of events from the repudiation of said contract by defendants, in the sum of Fifty Thousand (\$50,000.00) Dollars; that plaintiff is unable at the time of the filing of this action to particularize said further damage by reason of the fact that there is not, and has not been since said 7th day of June, 1946, a free and available market for said glucose; that plaintiff will, when the amount of said damage is ascertained, pray leave to insert herein by proper amendment hereto the exact amount of said estimated damage.

X.

That plaintiff has duly performed all of the conditions of said contract to be performed upon its part.

And for a Further and Second Cause of Action Against Said Defendant, plaintiff alleges:

I.

Plaintiff realleges each and every allegation contained in paragraphs I, II, III and IV of the first cause of action hereof, and by reference makes

them a part hereof as though set forth at length herein.

II.

That between the 20th day of May, 1946, and the 8th day of June, 1946, defendant became indebted to plaintiff in the sum of Eighty-four Thousand, Six Hundred Eighty-five and 72/100 (\$84,685.72) Dollars; that although demand has been made therefor, said defendant has failed, neglected and refused to pay said sum or any part thereof, and that the whole thereof is now due, owing and unpaid.

Wherefore, plaintiff demands judgment against said defendant for the sum of \$84,685.72, and for interest thereon from the date of filing of this complaint to date of judgment at the legal rate, and for plaintiff's costs herein incurred.

STANTON & STANTON,
By /s/ LOUIS B. STANTON,
Attorneys for Plaintiffs. [5]

EXHIBIT "A"

Schenley Distillers Corporation
850-900 Battery Street
San Francisco 11, California
Telephone YUkon 0440

May 23, 1946

Harold A. Whipple Co.
316 Commercial Street
Los Angeles 12, California

Attention: Mr. H. A. Whipple

Gentlemen:

This will confirm our telephone conversation and your letter of May 21st.

We hereby acknowledge the offer of Cia. Engraw Comercial & Industrial S. A., of 600 tons of glucose made from pure corn syrup, crystal clear, and testing between 43 and 45 Baume, at a price of 1.375 pesos per kilogram. The price listed is f.o.b. steamer, Buenos Aires, packaged in wood cooperage containing approximately 660 pounds each. Shipment is to be made via McCormick Steamship Co. to San Francisco or Los Angeles.

A purchase order will be sent to Cia. Engraw Comercial & Industrial S. A. as soon as possible covering this purchase, and a letter of credit will be set up to cover the full amount in pesos. Expiration date will be October 30, 1946, or as confirmed. Shipment of this material is to be at a rate of 150 tons a month.

All correspondence will be handled via air mail instead of regular mail, in order to speed this matter.

Very truly yours,
SCHENLEY DISTILLERS
CORPORATION,
/s/ J. B. DONNELLY.

JBD:LP

P. S. Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial S. A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept.—200; Sept.—150; October—275; November—200; December—200. The conditions of acceptance of this quantity are the same as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing.

[Endorsed: Filed Jan. 9, 1947. [6]]

[Title of District Court and Cause.]

NOTICE OF MOTION, MOTION TO DISMISS,
AND MOTION TO MAKE MORE DEFINITE AND CERTAIN. [7]

To the Plaintiff Above Named and to Messrs. Stanton & Stanton, Its Attorneys:

You and Each of You Will Please Take Notice and You Are Hereby Notified that on Monday, the 24th day of February, 1947, at the hour of

10:00 o'clock a.m. of said day or as soon thereafter as counsel may be heard, at Court Room No. 6 of the above entitled Court, located in the Federal Building in the City of Los Angeles, County of Los Angeles, State of California, Judge Ben Harrison presiding, Schenley Distillers Corporation, a Delaware corporation, by and through the undersigned, its counsel of record herein, will move said Court for an order as follows:

As to the Alleged First Cause of Action Set Forth in Plaintiff's Complaint:

1. To dismiss the alleged first cause of action because the said first cause of action fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the alleged first cause of action, or in lieu thereof for an order requiring plaintiff to aver a more definite and certain statement of the following matters appearing in paragraph V of the said first cause of action set forth in plaintiff's complaint, to-wit:

(a) To aver how or in what manner the plaintiff consented to the alleged written agreement incorporated by reference in said paragraph V and attached as an exhibit to said complaint;

(b) To aver whether the alleged offer or offers mentioned in said alleged written agreement were wholly oral or wholly written, or partly oral and partly written;

(c) To aver the terms of said alleged offer or offers [8] in haec verba, and, if said offer or offers were wholly or partly written, to furnish a copy or copies thereof;

(d) To aver specifically the items of damage claimed in paragraphs VIII and IX of said first cause of action.

As to the Alleged Second Cause of Action Set Forth in Plaintiff's Complaint:

1. To dismiss the alleged second cause of action because the said second cause of action fails to state a claim against the defendant upon which relief can be granted.

2. To dismiss the alleged second cause of action, or in lieu thereof for an order requiring plaintiff to aver a more definite and certain statement of the following matters appearing in paragraph II of the said second cause of action set forth in plaintiff's complaint, to-wit:

(a) To aver how or in what manner or for what consideration defendant incurred the alleged indebtedness to plaintiff.

Said Motion to Dismiss will be made and based upon the ground that neither the complaint nor either of the causes of action attempted to be stated therein state facts sufficient to constitute a cause of action against the defendant, or state a claim against defendant upon which relief can be granted, and said Motion to Make More Defi-

nite and Certain will be based upon the ground that the foregoing matters so sought to be restated more definitely and certainly are and each thereof is not alleged with sufficient definiteness or particularity to enable defendant to properly prepare its responsive pleading to said complaint or to prepare for the trial of the above entitled action. [9]

Said Motions will be further made and based upon all of the records, papers and files in the above entitled action including this Notice of Motion and Points and Authorities in support thereof, copies of which are herewith served upon you.

Dated: February 8, 1947.

/s/ EDGAR H. ROWE,
BRONSON, BRONSON &
McKINNON,
Attorneys for Defendant. [10]

Points and Authorities in Support of the
Foregoing Motions

Rules 7(b), 12(b) and 12(e), Rules of Civil
Procedure for the District Courts of the
United States.

1. The alleged first cause of action set forth in plaintiff's complaint fails to state a cause of action against defendant in that the facts alleged do not show the existence of a legally binding contract.

It is essential to the existence of a contract that the parties mutually consent to the agreement and

that such consent be communicated by each to the other. Mutual consent is communicated in the form of an offer or proposal by one party which is accepted by the other party. Unless the offer is unconditionally accepted, no contract comes into existence.

California Civil Code, Sections 1550, 1565, 1580 and 1585.

Tuso v. Green, 194 Cal. 574.

Niles v. Hancock, 140 Cal. 157.

Newspaper Readers Service, Inc., v. Canonsburg Pottery Co., 52 F. Supp. 341. 6 Cal. Jur. p. 41 and p. 61.

Willston on Contracts, Section 23.

Restatement of Contracts, Section 22.

The alleged written contract pleaded by plaintiff is merely a purported letter of acceptance and does not in itself constitute a legally binding contract. The alleged offer must be considered together with the purported letter of acceptance to determine whether a legally binding contract came into existence. That a purported letter of acceptance in itself does not constitute a legally binding agreement between the parties is evident from the following language in Tuso v. Green, 194 Cal. 574, at pages 580-581, where the Court states: [11]

“A contract between two parties is created by a proposal or offer by one of the parties and an acceptance thereof by the other. A contract of

sale may well consist of a proposal on the part of the seller embodied in a letter signed by him alone, and an acceptance thereof on the part of the buyer embodied in another letter signed by him alone. Such is the common practice in everyday affairs. When the minds of the parties meet, that is to say, when the respective writings match one another as to subject matter, terms, and conditions, a contract comes into existence between the parties, and when such terms and conditions are stated in writings which are signed by the respective parties the contract is none the less a contract in writing merely because each of the respective writings is signed by but one of the parties. Such a contract in writing fully satisfies the statute of frauds. (Frost v. Alward, 176 Cal. 691 (169 Pac. 379); Merkeley v. Fisk, 179 Cal. 748 (178 Pac. 945); 12 Cal. Jur. 904, and cases cited.) In construing such a contract the separately executed instruments are to be considered and construed together as one contract."

Where a cause of action is based upon a written contract which is pleaded in *haec verba*, then the written instrument so pleaded is controlling as to the existence and terms of the contract.

Alphonzo E. Bell Corp. v. Bell View Oil Syndicate, 46 Cal. App. (2d) 684, 691.

Pimentel v. The Hall-Baker Co., 32 Cal. App. (2d) 697, 701.

For the foregoing reasons, a more definite statement is necessary.

Forstmann v. Wenner-Gren, 1 F. R. D. 775.

D. L. Stern Agency, Inc. v. Mutual Benefit Health and Accident Assoc., 43 F. Supp. 167.

5 Cyclopedia of Federal Procedure, Section 1745.

Furthermore, in an action for breach of contract, the items of damage claimed must be set forth specifically.

Rules 9(f) and (g), 12(e) of Rules of [12] Civil Procedure for the District Courts of the United States.

Miller Co. v. Hyman, 28 F. Supp. 312.

4 Cyclopedia of Federal Procedure, Section 1185.

2. The alleged second cause of action set forth in plaintiff's complaint fails to state a cause of action against defendant in that:

(a) No ultimate facts are stated in plaintiff's complaint from which the legal conclusion of indebtedness may be derived.

Rule 8(a) (2), Rules of Civil Procedure for the District Courts of the United States.

Washburn v. Moorman (S. D., Cal., 1938), 25 F. Supp. 546.

Tate v. Shoher, 1 F.R.D. 632.

(b) A common count will not lie where the contract is executory on both sides.

Willett & Burr v. Alpert, 181 Cal. 652, 659.

King v. San Jose Pacific Building & Loan Assoc., 41 Cal. App. (2d) 705.

For the foregoing reasons, a more definite statement is necessary.

Rules 9(f) and (g) and 12(e), Rules of Civil Procedure for the District Courts of the United States.

Respectfully submitted,

/s/ EDGAR H. ROWE,

BRONSON, BRONSON &

McKINNON,

Attorneys for Defendant. [13]

State of California,

County of Los Angeles—ss.

Lucille W. Ralls being sworn says that affiant is a citizen of the United States, over the age of 18 years, not a party to the within action and is a resident of Los Angeles County; affiant's business address is Room 1135 Fidelity Building, 548 South Spring, Los Angeles 13, California. That affiant served the within Notice of Motion and Motion to Dismiss and Motion to Make More Definite and Certain by placing a true copy thereof in an envelope addressed to Stanton & Stanton, 740 South Broadway, Los Angeles 14, California and thereafter sealing said envelope and depositing same, with postage fully prepaid, in the United States Mail at Los Angeles, California. That there is

delivery service by United States mail at the place of addressee or there is regular communication by mail between the place of mailing and the place so addressed.

/s/ LUCILLE W. RALLS.

Subscribed and sworn to before me February 10, 1947.

[Seal] /s/ BETTY WALLACE,
Notary Public within and for said County and State.

My commission expires Feb. 6, 1949.

[Endorsed]: Filed Feb. 10, 1947. [14]

At a stated term, to wit: The February Term A.D. 1947, of the District Court, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 24th day of February in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Ben Harrison, District Judge.

[Title of Cause.]

ORDER DENYING MOTION TO DISMISS

This cause coming on for hearing motion of defendant to dismiss and motion to make more definite and certain, filed February 10, 1947; Messrs.

Stanton and Stanton by Attorney Stanton appearing as counsel for the plaintiff; E. H. Rowe, Esq., appearing as counsel for the defendant:

Attorney Rowe presents the said motions and the Court and counsel discuss the same. It is ordered that the said motions are denied and the defendant is allowed twenty (20) days to answer.

[Title of District Court and Cause.]

AMENDED COMPLAINT—BREACH OF CONTRACT

By leave of court first had and obtained, plaintiff files its amended complaint in the above entitled action and for cause of action alleges as follows, to wit:

I.

That jurisdiction is founded upon diversity of citizenship; that plaintiff *Compania Engraw Commercial E Industrial S. A.* is a citizen of the Republic of Argentina and defendant *Schenley Distillers Corporation* is a corporation organized and existing under and by virtue of the laws of the State of Delaware; that the amount in controversy exceeds the sum of \$3,000.00.

II.

That plaintiff *Compania Engraw Comercial E Industrial S. A.* is now and at all times herein mentioned has been a corporation duly organized

and existing under and by virtue of the laws of the Republic of Argentina and having its principal place of business in the City of Buenos Aires, Republic of Argentina. [16]

III.

That defendant Schenley Distillers Corporation is now and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of Delaware; that on or about the 28th day of May, 1945, said defendant filed, in the office of the Secretary of State of the State of California, a copy of its articles of incorporation, duly certified by the Secretary of State of the State of Delaware, together with a statement showing the location and address of its principal office, the location and office of its principal office within the State of California, the name and address of a person within the State of California upon whom process directed to defendant may be served, to wit, John P. Daly, c/o C. T. Corporation System, Mills Building, San Francisco, and its irrevocable consent to service upon said John P. Daly of process issuing from all courts sitting in said State of California, both State and Federal.

IV.

That the contract hereinafter alleged was and is in writing and subscribed by said defendant; that said contract was made and entered into within the County of Los Angeles, State of California, and within the Southern District of California, Cen-

tral Division thereof; that said defendant has now and at all times herein mentioned has had an office and principal place of business within said County of Los Angeles, State of California.

V.

That on or about the 23rd day of May, 1946, consequent upon oral and written offers a contract in writing was made and entered into by plaintiff on the one part and defendant on the other part, under and by the terms whereof plaintiff agreed to sell and deliver to defendant, and defendant agreed to purchase and receive from the plaintiff, f.o.b. steamship at Buenos Aires, Republic of Argentina, 1135 tons of glucose, made from pure, crystal clear, corn syrup and testing between 43° and 45° Baume, at 1.375 Argentine pesos per kilo, packed in wooden cooperage containing approximately 660 pounds each, and delivered to McCormick Steamship Company at Buenos Aires for carriage to San Francisco or Los Angeles, California, under shipping schedule as follows: [17]

50 tons in June, 60 tons in July, 200 tons in August, 150 tons in September, 275 tons in October, 200 tons in November, 200 tons in December; all in the year 1946;

and further agreed to make payments for the total purchase price of said glucose on or before the 30th day of October, 1946, at the rate of 335.82 Argentine pesos to 100 American dollars, and thereby defendant agreed to pay to plaintiff the

sum of \$464,720.68; that a true and correct copy of said contract is hereto attached, marked "Exhibit A" and hereby specifically referred to as if herein set forth at length.

VI.

That plaintiff purchased on the Buenos Aires, Argentina, market said 1135 tons of glucose made from pure, crystal clear, corn syrup and testing between 43° and 45° Baume, packaged in wooden cooperage containing approximately 660 pounds each, ready for delivery to McCormick Steamship Company steamers at said Buenos Aires, at the delivery dates set forth and prescribed in said shipping schedule; that said plaintiff duly performed each and all of the conditions and provisions under said contract to be performed upon its part and was ready, willing and able at the times of the various deliveries specified therein to make and deliver in true accord with said contract the glucose to be delivered thereunder.

VII.

That on or about the 7th day of June, 1946, said defendant informed said plaintiff at Los Angeles, California, by wire, to proceed no further with said contract or deliveries thereunder.

VIII.

That plaintiff immediately thereafter commenced negotiations with said defendant and said defendant actively and continuously negotiated with said plaintiff for the completion of said contract and

deliveries thereunder up to and until the 18th day of September, 1946; that on or about said 18th day of September, 1946, said defendant definitely refused to accept any deliveries under or pursuant to said contract. [18]

IX.

That on or about the 18th day of September, 1946, at the City of New York, said plaintiff made and delivered to said defendant a notice in writing of its intention to resell said 1135 tons of glucose; that a true and correct copy of said notice is hereto attached, marked "Exhibit B" and hereby specifically referred to as if herein set forth at length; that at said time said defendant had a principal office in said City of New York, State of New York.

X.

That there was an actual market in the City of Buenos Aires, Argentina, for the purchase and sale of glucose made from pure, crystal clear, corn syrup and testing between 43° and 45° Baume, both for internal consumption and for exportation, during the period from May 23, 1946, to May 7, 1947; that the market price for said glucose at and in the Buenos Aires market for the months, commencing with June, to and including the month of November, 1946, was the sum of 60c per kilogram; that the market price for said glucose in said Buenos Aires market for deliveries during the month of December, 1946, was the sum of 57c per kilogram; that said market prices were for bulk

glucose; that the cost of cooperage to place said glucose in kegs containing 660 pounds each and to deliver said glucose so packed free on board of the vessel in Buenos Aires during all of said period was the sum of 15 centavos per kilogram; that the total cost of said cooperage and delivery costs and charges for said 1135 tons of glucose during said period was the sum of \$50,696.79; that the total market price in said Buenos Aires market for said 1135 tons of glucose during said period, calculated at said respective market prices and reduced to American dollars at the contract exchange rate aforesaid of 3.3582 pesos to the dollar, was and is the sum of \$201,595.90; that the total cost of said glucose, cooperage and expense of placing said glucose on board ship in Buenos Aires was and is the sum of \$252,292.69.

XI.

That by reason of said refusal on the part of said defendant to accept and pay for said 1135 tons of glucose, said plaintiff has suffered damage at the hands of said defendant in the sum of \$212,427.99; that said sum is equal to the difference between said contract price of \$464,720.68 and said cost of [19] placing said glucose on board of vessel in Buenos Aires in accordance with said shipping schedule in the sum of \$252,292.69.

And for a Second and Further Cause of Action Against Said Defendant, plaintiff alleges as follows, to wit:

I.

Re-alleges each and all of the allegations con-

tained in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the first count of this complaint.

II.

That between said 18th of September, 1946, and the 9th day of April, 1947, plaintiff assiduously endeavored to resell said 1135 tons of glucose and to resell various portions thereof in the market of Buenos Aires and in the various markets of the world at large; that on or about the 9th day of April, 1947, said plaintiff sold and disposed of the whole of said 1135 tons of glucose.

III.

That there was an actual market in the City of Buenos Aires, Argentina, for the purchase and sale of glucose made from pure, crystal clear, corn syrup, and testing between 43° and 45° Baume, on or about the said 9th day of April, 1947; that said market price for said glucose prevailing during said month of April, 1947, was the sum of 50 centavos per kilogram; that said market price was for bulk glucose; that the cost of cooperage to place said glucose in kegs containing 660 pounds each and to deliver said glucose so packed f.o.b. of a vessel in Buenos Aires during said month of April was the sum of 15 centavos per kilogram; that the total cost of said cooperage and delivery costs and charges for said 1135 tons of glucose on said 9th day of April, 1947, was the sum of \$50,-696.79; that the total market price in said Buenos Aires market for said 1135 tons of glucose on or

about said 9th day of April, 1947, calculated at said market price and reduced to American dollars at the contract exchange rate aforesaid of 3.3582 pesos to the dollar, was and is the sum of \$168,-989.34; that the total cost of said glucose cooperage and expenses of placing said glucose on board ship in Buenos Aires on said 9th day of April, 1947, was and is the sum of \$219,686.13. [20]

IV.

That by reason of said refusal on the part of said defendant to accept and pay for said 1135 tons of glucose, said plaintiff has suffered damage at the hands of said defendant in the sum of \$245,034.55; that said sum is equal to the difference between said contract price of \$464,720.68 and said cost of placing said glucose on board vessel in Buenos Aires on said 9th day of April, 1947, in said total sum of \$219,686.13.

And for a further and third cause of action against said defendant, plaintiff alleges as follows, to wit:

I.

Plaintiff re-alleges each and every allegation contained in paragraphs I to IX, inclusive, of the first count of this complaint, and by reference makes them a part hereof as if set forth at length herein.

II.

That between the 20th day of May, 1946, and the 10th day of May, 1947, defendant became indebted

to plaintiff in the sum of \$245,034.55; that although demand has been made therefor, said defendant has failed, neglected and refused to pay said sum or any part thereof and that the whole thereof is wholly due, owing and unpaid.

Wherefore, plaintiff prays judgment against said defendant for the sum of \$245,034.55, together with interest thereon at the legal rate of 7% per annum, from the 26th day of October, 1946, to date of judgment, and for plaintiff's costs herein incurred.

STANTON & STANTON,
By /s/ LOUIS B. STANTON,
Attorneys for Plaintiff. [21]

EXHIBIT "A"

Schenley Distillers Corporation
850-900 Battery Street
San Francisco 11, California
Telephone YUkon 0440

May 23, 1946

Harold A. Whipple Co.
316 Commercial Street
Los Angeles 12, California

Attention: Mr. H. A. Whipple

Gentlemen:

This will confirm our telephone conversation and your letter of May 21st.

We hereby acknowledge the offer of Cia. Engraw Comercial & Industrial S. A., of 600 tons of glu-

cose made from pure corn syrup, crystal clear, and testing between 43 and 45 Baume, at a price of 1.375 pesos per kilogram. The price listed is f.o.b. steamer, Buenos Aires, packaged in wood cooperage containing approximately 660 pounds each. Shipment is to be made via McCormick Steamship Co. to San Francisco or Los Angeles.

A purchase order will be sent to Cia. Engraw Comercial & Industrial S. A. as soon as possible covering this purchase, and a letter of credit will be set up to cover the full amount in pesos. Expiration date will be October 30, 1946, or as confirmed. Shipment of this material is to be at a rate of 150 tons a month.

All correspondence will be handled via air mail instead of regular mail, in order to speed this matter.

Very truly yours

SCHENLEY DISTILLERS
CORPORATION

/s/ J. B. DONNELLY

JBD:LP

P. S. Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial S. A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept.—200; Sept.—150; October—275; November—200; December—200. The conditions of acceptance of this quantity are the same as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing. [22]

EXHIBIT "B"
Hotel New Yorker
New York, N. Y.

September 18, 1946

Mr. Ralph Heymsfeld,
Schenley Distillers Corp.,
350 Fifth Avenue,
New York, N. Y.

Dear Sir:

This is to notify you that the suppliers with whom we contracted for the 1135 tons of glucose which we sold to your Company have finally refused to accept cancellation of the contracts. We are, therefore, proceeding to sell the glucose at best prices obtainable and will, of course, look to you for payment to us of the difference between the prices thus obtained and the price at which you contracted to purchase the same.

Yours truly,

COMPANIA ENGRAW
COMERCIAL E
INDUSTRIAL S. A.

By G. FRED BERGER

Receipt of copy acknowledged.

[Lodged]: July 24, 1947.

[Endorsed]: Filed Aug. 4, 1947. [23]

NOTICE OF MOTION, AND MOTION TO DISMISS, AND MOTION TO MAKE MORE DEFINITE AND CERTAIN AND POINTS AND AUTHORITIES IN SUPPORT THEREOF [25]

To Plaintiff Above Named and to Messrs. Stanton & Stanton, Its Attorneys:

You And Each of You Will Please Take Notice that on Monday, the 25th day of August, 1947, at the hour of 10:00 o'clock A.M. of said day or as soon thereafter as counsel may be heard at court room No. 6 of the above entitled court located in the Federal Building, City of Los Angeles, County of Los Angeles, State of California, defendant Schenley Distillers Corporation, a Delaware corporation, by and through the undersigned, its counsel of record herein, will move said court for orders as follows; with respect to plaintiff's amended complaint.

I.

Motion to Dismiss

1. To dismiss the first cause of action in said complaint because said first cause of action fails to state a claim upon which relief can be granted in that:

(a) There are no allegations contained in said cause of action showing or alleging the existence of any contract upon which a cause of action could be based;

(b) There are no facts alleged in said cause of action which support any claim for damages or which show that plaintiff was damaged by any act or omission of defendant.

2. To dismiss the second cause of action in said complaint because said second cause of action fails to state a claim upon which relief can be granted in that:

(a) There are no allegations contained in said cause of action showing or alleging the existence of any contract upon which a cause of action could be based;

(b) There are no facts alleged in said cause of action which support any claim for damages or which show that plaintiff was damaged by any act or omission of defendant.

3. To dismiss the third cause of action in said complaint [26] because said third cause of action fails to state a claim upon which relief can be granted in that:

(a) There are no allegations contained in said cause of action showing or alleging the existence of any contract upon which a cause of action could be based;

(b) There are no facts alleged in said cause of action which support any claim for damages or which show that plaintiff was damaged by any act or omission of defendant;

(c) A common count will not lie to recover for the breach of an express executory contract.

II.

Motion for a More Definite Statement of Complaint

1. As To The First Cause Of Action:

(a) How or in what manner the allegations of paragraph V constitute any part of the alleged contract in writing attached to plaintiff's complaint and marked "Exhibit A" and particularly the alleged promise and agreement to pay plaintiff the sum of \$464,720.68;

(b) How or in what manner plaintiff assented to or became bound by the alleged written agreement incorporated by reference in said paragraph V and attached as "Exhibit A" to said complaint.

(c) How or in what manner the alleged written agreement incorporated by reference in said paragraph V and attached as "Exhibit A" to said complaint constitutes a complete or any agreement between the parties.

(d) On what dates plaintiff purchased 1135 tons of glucose as alleged in Paragraph VI of said complaint and more particularly whether such purchase was made before or after June 7, 1946, or partly before and partly after June 7, 1946. [27]

(e) What price plaintiff paid for 1135 tons of glucose purchased as alleged in paragraph VII of said complaint.

(f) In what connection and for what purpose plaintiff negotiated with defendant as alleged in paragraph VIII of said complaint and to what end said negotiations were carried on as alleged.

(g) How or in what manner the allegations contained in paragraph X of said complaint are related to or have any bearing upon the cause of action sought to be stated by plaintiff, or relate to or have any bearing upon any damage suffered by plaintiff as a result of any alleged breach of said alleged contract.

(h) Whether plaintiff paid and expended the sum of \$201,595.90 in the purchase of said 1135 tons of glucose or more or less than that amount.

2. As to the Second Cause of Action:

(a) To make more definite and certain statements in connection with the second cause of action in the same particulars as set forth hereinabove in subdivisions (a) to (f) inclusive with regard to the first cause of action;

(b) Whether plaintiff was unable to sell said 1135 tons of glucose prior to April 9, 1947;

(c) Whether plaintiff actually sold said 1135 tons of glucose on the 9th day of April, 1947;

(d) At what price plaintiff sold said 1135 tons of glucose, if he did sell the same;

(e) Whether plaintiff sold said 1135 tons of glucose for his own account, or for or on behalf of defendant;

(f) Whether said 1135 tons of glucose had any market value on September 18, 1946; or on June 7, 1947.

(g) What relation or bearing the allegations of paragraphs III and IV have to or upon any damage sustained by plaintiff as a result of any alleged breach of any alleged contract. [28]

(h) Whether plaintiff suffered any damage, or lost any money, or lost any profit as a result of any alleged breach of any alleged contract.

3. As to the Third Cause of Action:

(a) To make more definite and certain statements in connection with the third cause of action in the same particulars as hereinabove set forth in subdivisions (a) to (f) inclusive with regard to the first cause of action;

(b) How or in what manner and in what particulars defendant became indebted to plaintiff in the sum as alleged in paragraph II of the third cause of action of said complaint.

III.

Motion to Strike

(a) To strike from the records the whole of plaintiff's complaint on the ground that it and every allegation therein contained is irrelevant in that no cause of action or basis for relief is pleaded; or

(b) To strike from said complaint the whole of the second cause of action because it is identical to

the first cause of action, and is, therefore, surplusage, redundant, and irrelevant; and/or

(c) To strike from the first cause of action the whole of paragraph X because it is completely irrelevant to the cause of action sought to be stated and any relief obtainable or sought to be obtained; and/or

(d) To strike from the complaint the whole of the third cause of action because a common count does not lie to recover on an express executory contract.

Said motion to dismiss will be made and based upon the ground that neither the complaint nor the causes of action attempted to be stated therein states facts sufficient to [29] constitute a cause of action against the defendant or states a claim against defendant upon which relief can be granted. Said motion to make more definite and certain will be based upon the ground that the foregoing matters so sought to be restated more definitely and certainly and each thereof is not alleged with sufficient definiteness or particularity to enable defendant to properly prepare its responsive pleading to said complaint or to prepare for the trial of the above entitled action.

Said motions will be made and based upon all of the records, papers and files in the above entitled action, upon this notice of motion and the motions herein contained and the points and authorities in

support thereof, copies of which are hereto served upon you.

Dated: August 18, 1947.

/s/ EDGAR H. ROWE,
BRONSON, BRONSON &
McKINNON,
Attorneys for Defendant. [30]

Memorandum of Points and Authorities in Support
of the Foregoing Motions

I.

Motion to Dismiss

Plaintiff has failed to show or plead the existence of a contract between itself and defendant. They cannot properly, therefore, state a cause of action for damages.

The letter pleaded in haec verba, and attached as "Exhibit A" to the complaint cannot constitute a written contract for the following reasons:

1. It is signed by only one party.
2. It is expressly not a written contract, but a communication to plaintiff which is in response to a proposal submitted to defendant by plaintiff. It is, therefore, either an acceptance or a counter-offer to which plaintiff must plead an acceptance by itself. If it is an acceptance of an offer, the complaint, if it is adequately to plead a contract, must show that this letter created a contract by pleading an offer which the letter accepts unconditionally. If, on the

other hand, the letter varies or adds any terms or qualifications to the offer, the letter is not an acceptance but a counter-offer, which plaintiff must plead that it accepted. (The letter itself indicates clearly that this latter situation is the fact.) As the complaint stands, there is alleged merely a letter from defendant to plaintiff which cannot have created, in itself, a contract. There must be alleged in addition either facts leading up to the letter (i. e., an offer), or occurring after its receipt (an acceptance by plaintiff), one of which is essential to the showing of any contract based upon the pleaded letter. Two parties are essential to the creation of a contract, and a meeting of the minds must occur between them. Plaintiff's pleading seems to be based upon the fact that a contract can be [31] created by one party, without any meeting of the minds, or any communication of assent.

The following authorities support the foregoing statements:

California Civil Code, Sections 1550, 1565,
1580, and 1585

Tuso v. Green, 194 Cal. 574

Niles v. Hancock, 140 Cal. 157

Newspaper Readers' Service, Inc. v. Canons-
burg Pottery Co., 52 F. Supp. 341

6 Cal. Jur. 41, 61

Williston on Contracts, Sec. 23

Restatement of Contracts, Sec. 22

The complaint purports to plead a contract in haec verba. The written instrument, therefore, is controlling as to the existence and terms of the contract.

Alphonzo E. Bell Corp. v. Bell View Oil Syndicate, 46 Cal. App. (2d) 684, 691

Pimentel v. Hall-Baker Co., 32 Cal. App. (2d) 697, 701.

Since the letter is relied upon in all three causes of action, the foregoing argument reaches every cause of action sought to be stated.

The third cause of action is vulnerable on two additional grounds.

1. It purports to be a common count in assumpsit, and it is settled that a common count does not lie to recover for the breach of an express executory contract.

3 Cal. Jur. 382, 383

Willett & Burr v. Alpert, 181 Cal. 652, 659

King v. San Jose Pac. Bldg. & Loan Ass'n.,
41 Cal. App. (2d) 705

2. Ultimate facts must be pleaded from which any [32] conclusion of indebtedness may be deduced.

Rule 8(a)(2), Rules of Civil Procedure

Washburn v. Moorman, (S.O., Cal., 1938) 25
F. Supp. 546

Tate v. Shober, 1 F.R.D. 632

II.

Motion for More Definite Statement

In our motion for a more definite statement, requests (a) to (c), inclusive, parallel our argument that the letter pleaded in *haec verba* does not of itself constitute a contract. We ask that the additional allegations necessary to plead a contract be set forth. We point out further in request (a) that there is no basis in the pleaded letter for the conclusions of the pleader that defendant promised to pay \$464,720.68 on an exchange rate of 335.82 Argentine pesos to 100 American dollars.

The remaining requests relate generally to damages, and the theories upon which plaintiff seeks to recover them.

Section 3358 of the California Civil Code, provides:

“Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in the cases specified in the articles on exemplary damages and penal damages . . .”

The measure of damages in an action by a seller for breach of contract is statutory.

Where the seller has performed and the buyer refuses to accept delivery and the seller retains the goods, the measure of damages is the difference

between the contract price and the market value of the goods at the date of the breach.

California Civil Code, Section 1784 [33]

Rice v. Schmid, 18 Cal. (2d) 259

Rice v. Schmid (a subsequent appeal) 25 Cal. (2d) 259

Applying these principles to the complaint in this action, it is clear that plaintiff's measure of damage is the difference between the market price at the time of the breach, that is, on June 7, 1947, and the contract price.

Because of these rules, and the facts alleged, we seek to have the following additional information pleaded, in order to ascertain what relevance, if any, certain of the pleaded facts have to plaintiff's cause of action or damages:

1. What did plaintiff pay for the goods it allegedly purchased?
2. When did it purchase those goods—before or after June 7, 1946, on which date defendant allegedly notified plaintiff to proceed no further?
3. Did plaintiff actually resell the goods? The second cause of action merely indicates that plaintiff could have sold them on April 9, 1947.
4. If it did re-sell the goods, what price did it receive for them?
5. If plaintiff did not sell the goods, and it still

has them, what did it pay for them? The first cause of action alleges prices at which the goods could have been purchased by it, but not whether it actually paid those prices.

Plaintiff's complaint is also inconsistent in that it pleads in the first cause of action that there was a market for glucose on and after June 7, 1946 but in the second cause of action it pleads, in effect, that there was no market from September 18, 1946 to April 9, 1947.

In its first cause of action, plaintiff apparently seeks to recover on the basis of loss of profits. That is not the [34] measure of plaintiff's damage. (Even if it were, however, we have shown above that plaintiff didn't establish the cost of the goods to it.)

In its second cause of action, plaintiff pleads damages based upon what the goods could have been resold for on April 9, 1947. However, plaintiff doesn't plead (1) that there was no market for the goods on June 7, 1946, the date of the alleged breach, or (2) that it actually did sell the goods at all, and if so, for what price.

III.

Motion to Strike

The first and second causes of action are identical in theory. One of them, therefore, is surplusage. The only difference in the two counts is the manner in which the measure of damage is pleaded. How-

ever, as to this, plaintiff can have no alternative or election. Under the facts of any given case, there can be only one measure of damage; i.e., the difference between the market value at date of breach and the contract price. The second cause of action, therefore, which attempts to fix damages on the basis of a re-sale price should be stricken.

The allegations of paragraph X of the first cause of action are irrelevant, and should be stricken. Plaintiff pleads therein prices at which glucose could have been purchased by it at various times. But it does not allege that it purchased the glucose at those prices. However, even if it did so allege, the allegations should still be stricken because they form the basis for a claim for loss of profits. Under none of the facts alleged can loss of profits be recovered in this case.

The third cause of action should be stricken because a common count does not lie for the breach of an express executory contract.

Respectfully submitted,

/s/ EDGAR H. ROWE,

BRONSON, BRONSON &

McKINNON,

Attorneys for Defendant. [35]

AFFIDAVIT OF SERVICE BY MAIL

State of California

City and County of San Francisco—ss.

Lucile Carlson, being duly sworn, deposes and says: That she is and at all times herein mentioned

was a citizen of the United States residing in San Francisco, where the mailing herein referred to took place; that she is over the age of 18 years, not a party to the within entitled cause nor interested in the event thereof. That at all of the times herein mentioned she was and still is a clerk and employee in the office of Bronson, Bronson & McKinnon, attorneys for Defendant Schenley Distillers Corporation in the above entitled action; that at all times herein mentioned the office of said Bronson, Bronson & McKinnon was and now is at 1500 Mills Tower, 220 Bush Street, in the City and County of San Francisco, State of California. That at all times herein mentioned the office of Stanton & Stanton, attorneys for Plaintiff, Compania Engraw Commercial E Industrial S. A. was and still is at 6926 Melrose Street, Los Angeles, California. That on the 18th day of August, 1947 affiant served the within Notice of Motion and Motion to Dismiss and Motion to Make More Definite and Certain and Points and Authorities in Support Thereof by mail, in the following manner: Affiant enclosed a true copy of said documents in an envelope addressed as follows: Stanton & Stanton, 6926 Melrose Street, Los Angeles, California, sealed said envelope and deposited it, so sealed and addressed on said 18th day of August, 1947 with the said enclosure therein and with the postage thereon fully prepaid, in the United States Post Office in the City and County of San Francisco, State of California. That there

is a regular daily communication by mail between said points of mailing.

/s/ LUCILE CARLSON.

Subscribed and sworn to before me this 18th day of August, 1947.

[Seal] /s/ ALFRED D. MARTIN,

Notary Public.

In and for the City and County of San Francisco,
State of California. [36]

ORDER SHORTENING TIME

Good cause appearing therefor, it is hereby ordered that the foregoing motions may be heard at the time hereinbefore noticed, provided copies of said notice of motion and motion to dismiss and motion to make more definite and certain and points and authorities in support thereof are served upon plaintiff's attorneys on or before Wednesday, August 20, 1947.

/s/ JACOB WEINBERGER,

Judge of the U. S.

District Court.

[Endorsed]: Filed Aug. 20, 1947. [37]

At a stated term, to wit: The February Term, A. D. 1947, of the United States District Court, within and for the Central Division of the Southern District of California, held at the Court Room

thereof, in the City of Los Angeles on Monday the 25th day of August in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Ben Harrison,
District Judge

[Title of Cause.]

ORDER DENYING MOTION TO DISMISS

For hearing (1) motion to produce, pursuant to notice thereof filed Aug. 8, 1947; (2) motion to vacate and/or strike plaintiff's notice of intention to take depositions upon written interrogatories, pursuant to notice thereof filed Aug. 8, 1947; (3) motion to settle interrogatories, pursuant to notice thereof, filed Aug. 13, 1947; (4) motion to require answers to questions on deposition, pursuant to notice thereof filed Aug. 16, 1947; (5) motions to dismiss, to make more definite and certain, pursuant to notices thereof filed Aug. 20, 1947; (6) motion to produce, pursuant to notice thereof filed Aug. 20, 1947; and (7) motion to require answers to questions on deposition, pursuant to notice thereof filed Aug. 20, 1947; Louis B. Stanton, Esq., for plaintiff; E. H. Rowe, Esq., for defendant;

Motion to dismiss will be submitted on briefs to be filed 5 x 5; other motions continued until motion to dismiss is determined.

Court orders trial date of Sept. 23, 1947, vacated, and continues cause to 2 PM today for argument.

At 2 PM motion to dismiss is denied, 10 days allowed to answer. [38]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Defendant, Schenley Distillers Corporation, a corporation, answering plaintiff's amended complaint on file herein, admits, denies and alleges:

As to the First Cause of Action

I.

Plaintiff can not maintain this action because it is a foreign corporation doing business in the State of California without having complied with the provisions of Section 405 of the Civil Code of the State of California and in violation [39] of Section 408 of the Civil Code of the State of California.

II.

The first cause of action of plaintiff's amended complaint fails to state a claim against defendant upon which relief can be granted.

III.

Answering paragraph I, defendant admits that it is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and admits that the amount in controversy exceeds the sum of \$3,000.00.

Further answering said paragraph I defendant states that it has no information or belief upon the subject of the remaining allegations thereof sufficient to enable it to answer said allegations, and placing its denial upon that ground denies each and every, all and singular, said allegations.

IV.

Answering paragraph II, defendant states that it has no information or belief on the subject of any allegations thereof sufficient to enable it to answer said allegations, and placing its denial upon that ground denies each and every, all and singular, said allegations.

V.

Answering paragraph IV, defendant admits that it has now and at all times mentioned has had an office and place of business within the County of Los Angeles.

Further answering said paragraph IV, defendant denies generally and specifically each and every, all and singular, the remaining allegations of said paragraph.

VI.

Answering paragraph V, defendant admits that J. B. Donnelly signed and addressed the letter to Harry A. Whipple Co. which is Exhibit "A" attached to the amended complaint and [40] which is incorporated by reference in paragraph V thereof.

Further answering paragraph V, defendant denies generally and specifically, each and every, all and singular, the remaining allegations contained in said paragraph.

VII.

Answering paragraph VI, defendant states that it has no information or belief on the subject of any

allegations thereof sufficient to enable it to answer any of the allegations of said paragraph, and placing its denial upon that ground denies each and every, all and singular, said allegations.

VIII.

Defendant denies each and every, all and singular, the allegations of paragraph VII and in this connection defendant alleges that on or about the 7th day of June, 1946, it advised Harold A. Whipple Co. by telegram and otherwise that it would not enter into any agreement with plaintiff for the purchase of glucose.

IX.

Answering paragraph VIII, defendant alleges that it never accepted any deliveries of glucose from plaintiff.

Except as alleged herein and further answering paragraph VIII, defendant denies generally and specifically, each and every, all and singular, the remaining allegations contained in said paragraph.

X.

Answering paragraph IX, defendant admits that it received from plaintiff the letter attached to plaintiff's amended complaint and marked Exhibit "B", to which letter defendant replied in writing by mail; a true and correct copy of defendant's reply is hereto attached, marked Exhibit "A" and made a part hereof by this reference the same as though specifically set out in full herein. [41]

Further answering paragraph IX, defendant denies generally and specifically, each and every, all and singular, the remaining allegations contained in said paragraph.

XI.

Answering paragraph X, defendant states that it has no information or belief on the subject of any allegations thereof sufficient to enable it to answer any of the allegations of said paragraph, and placing its denial upon that ground denies each and every, all and singular, said allegations.

XII.

Answering paragraph XI, defendant denies that plaintiff has suffered damage in the sum of \$212,-427.99, or any part thereof, or in any amount, by reason of any act or omission on the part of defendant or in any manner or at all, and in this connection defendant further alleges that it was not a party to any contract with plaintiff.

Further answering paragraph XI, defendant denies generally and specifically, each and every, all and singular, the remaining allegations contained in said paragraph.

As to the Second Cause of Action

I.

Plaintiff can not maintain this action because it is a foreign corporation doing business in the State of California without having complied with the provisions of Section 405 of the Civil Code of the

State of California and in violation of Section 408 of the Civil Code of the State of California.

II.

The second cause of action of plaintiff's amended complaint fails to state a claim against defendant upon which relief can be granted. [42]

III.

Defendant re-alleges each and every denial and allegation contained in its answer to paragraphs I, II, IV, V, VI, VII, VIII, IX, X and XI of the first cause of action, and by this reference makes each of said denials and allegations a part hereof the same as though specifically set forth herein.

IV.

Answering paragraph II of this cause of action, defendant states that it has no information or belief on the subject of any allegations thereof sufficient to enable it to answer any of the allegations of said paragraph, and placing its denial upon that ground denies each and every, all and singular, said allegations.

V.

Answering paragraph III, defendant states that it has no information or belief on the subject of any allegations thereof sufficient to enable it to answer any of the allegations of said paragraph, and placing its denial upon that ground denies each and every, all and singular, said allegations.

VI.

Answering paragraph IV, defendant denies that

plaintiff has suffered damage in the sum of \$245,-034.55, or any part thereof, or in any amount which plaintiff may hereafter particularize, by reason of any act or omission on the part of defendant or at all, and in this connection defendant further alleges that it was not a party to any contract with plaintiff.

Further answering paragraph IV, defendant denies generally and specifically, each and every, all and singular, the remaining allegations contained in said paragraph.

As a Further, Separate, Affirmative Defense To
The Amended Complaint and Each Cause of
Action Thereof, This Answering Defendant
Alleges: [43]

I.

The alleged contract set forth in each of the alleged causes of action contained in plaintiff's amended complaint is invalid and unenforceable by reason of the provisions of Section 1724 of the Civil Code of the State of California and Section 1973a of the Code of Civil Procedure of the State of California.

As a Further, Separate, Affirmative Defense to the
Amended Complaint and Each Cause of Action
Thereof, This Answering Defendant Alleges:

I.

The subject matter of the alleged sale agreement set forth in the plaintiff's amended complaint is

Argentine glucose; had any such agreement as alleged in said amended complaint been made and entered into between plaintiff and defendant (a fact which defendant specifically denies) it would have been impossible for plaintiff to have performed the said alleged agreement for the reason that, as defendant is informed and believes and upon such information and belief alleges, the export of glucose from the Argentine Republic to any other country was specifically prohibited by the laws of the Argentine Republic Nos. 12.591, 12.830 and Article 14 of Law No. 15.591, and regulations and orders regularly passed and made thereunder, during the period during which deliveries pursuant to the terms of said alleged contract were to be made by plaintiff at a West Coast port of the United States of America.

Wherefore defendant prays that plaintiff take nothing by its action and that defendant have judgment against plaintiff for its costs of suit herein, and for such other relief as may be meet and proper in the premises.

/s/ EDGAR H. ROWE,

BRONSON, BRONSON &

McKINNON,

Attorneys for Defendant. [44]

EXHIBIT "A"

SCHENLEY DISTILLERS CORPORATION

September 20, 1946

COMPANIA ENGRAW

Commercial E Industrial S. A.

San Martin 329

Buenos Aires

R. Argentina

Dear Sirs:

Your letter of September eighteenth has been received and in reply we beg to advise that the statement in your letter that you bought glucose for our Company is incorrect and that, as you have been previously and repeatedly advised, we have no obligation to you in the matter.

Yours very truly,

SCHENLEY DISTILLERS
CORPORATION

/s/ RALPH T. HEYMSFELD.

CC: Mr. G. Fred Berger

Room 1807

Hotel New Yorker

New York, N. Y.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 4, 1947. [45]

[Title of District Court and Cause.]

NOTICE OF MOTION TO FILE
AMENDMENT TO AMENDED COMPLAINT

To Defendant In the Above Entitled Action and
to Messrs. Bronson, Bronson & McKinnon,
Attorneys for Said Defendant:

You and Each Of You Will Please Take Notice that the plaintiff in the above entitled action, in the courtroom of the Honorable Leon R. Yankwich, in the Federal Building, in the City of Los Angeles, within said Southern District of California, on the 20th day of September, 1948, at 10:00 a.m. thereof, or as soon as counsel can be heard, will move the above entitled court for an order authorizing the filing of an amendment to the amended complaint of plaintiff herein, thereby amending paragraph V of the first count of said complaint and the corresponding inclusion of paragraph V of the first count of said amended complaint in paragraph I of the second cause of action therein, and will further move the court that service of said amendment made herewith be deemed and considered as service of said amendment, and that said amendment take effect as of date of the order hereon. [47]

Said motion will be made upon the ground that said amendment conforms to the proof herein.

Said motion will be made upon the amendment served and filed herewith.

Said motion will be made under the terms and

provisions of Rule 15-b of Federal Rules of Procedure.

Dated: This 10th day of September, 1948.

STANTON & STANTON,
By /s/ LOUIS B. STANTON. [48]

[Title of District Court and Cause.]

AMENDMENT TO AMENDED COMPLAINT

Now comes plaintiff, by leave of court first had and obtained, and files this, its amendment to the amended complaint, being paragraph V of the first cause of action and as realleged by paragraph I of the second cause of action.

V.

That between the 19th day of May, 1946, and the 25th day of May, 1946, a contract was made and entered into between plaintiff and defendant, under and by the terms whereof plaintiff agreed to sell and deliver to defendant, and defendant agreed to purchase and receive from plaintiff, 1135 tons of glucose made from pure, crystal-clear corn syrup testing between 43° and 45° Baume, with all costs and expenses paid on board steamship of the McCormick Steamship Co. in the Harbour of Buenos Aires, Argentina, for carriage to San Francisco or Los Angeles, at buyer's expense, at the price of 1.375 Argentine Pesos per kilo, packed in wooden

cooperage and containing approximately 660 pounds each, on a shipping schedule of 50 tons in June, 60 tons in July, 200 tons in August, 150 tons in September, 275 tons in [49] October, 200 tons in November and 200 tons in December, all in the year 1946; that said plaintiff undertook to furnish with each shipment a certificate of analysis, showing the glucose in each shipment to be of the prescribed specifications, and a certificate of inspection of cooperage; that thereby the total purchase price was \$464,720.68; that said defendant agreed to make payment of said total purchase price on or before the 30th day of October, 1946, by letter of credit at the exchange rate of 335.82 Argentine pesos to 100 American dollars; that said contract was evidenced by four letters in writing passing between plaintiff and defendant, respectively of dates May 20, May 21 and May 23, 1946; that memorandum in writing of said contract was signed by said defendant through and by its agent fully authorized so to do in that behalf; that a true and correct copy of said memorandum of sale is hereto attached, marked "Exhibit A" and hereby specifically referred to as if herein set forth at length.

STANTON & STANTON,

By /s/ LOUIS B. STANTON.

AFFIDAVIT OF SERVICE BY MAIL

State of California,

County of Los Angeles—ss.

Madeline Curry being first duly sworn, says:
That affiant is a citizen of the United States and a

resident of the county of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within above entitled action; that affiant's business address is 740 South Broadway, Suite 1004-09, Los Angeles 14, California; that on the 10th day of September, 1948, affiant served the within Notice of Motion to File Amendment to Amended Complaint and Amendment to Amended Complaint on the defendant in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said defendant at the office address of said attorneys, as follows: Messrs. Bronson, Bronson & McKinnon, 1500 Mills Tower, 220 Bush Street, San Francisco 4, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorneys for the person by and for whom said service was made.

That there is delivery service by the United States mail at the place so addressed or ** there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ MADELINE CURRY.

Subscribed and sworn to before me this 10th day of September, 1948.

[Seal] /s/ JOHN L. WELBOURN,
Notary Public in and for the County of Los Angeles, State of California.

Copy received.

[Endorsed]: Filed Sept. 10, 1948. [51]

At a stated term, to wit: The September Term. A.D. 1948, of the United States District Court, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 20th day of September in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Leon R. Yankwich,
District Judge.

[Title of Cause.]

ORDER PERMITTING FILING OF
AMENDMENT TO AMEND COMPLAINT

For (1) hearing motion of plaintiff, filed Sept. 10, 1948, to file amendment to amended complaint, (2) hearing motion of defendant to continue for further proceedings and argument, and (3) further proceedings on trial and oral argument; L. B. Stanton, Edw. Stanton, and J. L. Welbourn, Esqs., appearing as counsel for plaintiff; E. H. Rowe, Esq., appearing as counsel for defendant.

Attorneys Louis B. Stanton and Rowe argue re motion (2) of defendant for continuance. Court orders motion (1) of plaintiff to file amendment to amended complaint granted, and that said amendment be deemed denied by defendant.

Court orders motion (2) of defendant to continue for further proceedings and argument granted; and orders cause continued to Nov. 8, 1948, 10 a.m., for further proceedings. [52]

[Title of District Court and Cause.]

DECISION

The above-entitled cause heretofore tried, argued and submitted, is now decided as follows:

Judgment will be for the plaintiff that he recover of and from the defendant the amount equivalent to the difference between the contract price of the glucose contracted for (1.375 pesos per kilo) and the market price as shown by the evidence, as of June 6, 1946, (1.20 pesos per kilo), the day of the repudiation of the contract, the exact amount to be computed in accordance with Local Rule 7(h), in American dollars, at the rate of exchange obtainable in the open market on the date of the judgment.

Findings and judgment to be prepared by counsel for the plaintiff under Local Rule 7. [53]

Comment

Briefly I indicate the specific findings in the case.

1. I find that a valid contract was entered into by the plaintiff and the defendant. The written communications between the parties set forth fully the essential conditions of the transaction. The mechanics of payment were not a condition precedent to the consummation of the contract, and were not considered such by the parties. More, I am of the view that the office memorandum, dated May 23, 1946, signed by J. B. Donnelly (Plaintiff's Exhibit 58), is a sufficient memorandum embodying all the elements of a valid contract, even if the documents which preceded it were not legally sufficient. (See,

Restatement, Sec. 209; 2 Williston on Contracts, Revised Ed., 1936, Sec. 579; *Moss v. Atkinson*, 1872, 44 C. 3; *McKevitt v. City of Sacramento*, 1921, 55 C.A. 117). The letter speaks of a consummated purchase and of a letter of acceptance which was being sent to Engraw's representative. These statements are not the declarations of a subaltern, but those of an authorized executive whose interpretation of the transaction sets forth clearly its purport.

2. I find that the agreement was repudiated by the defendant on June 6, 1946. The comments at the oral argument sufficiently indicate the basis for this conclusion. It should, however, be said, both as to this and the next finding, that, granting that a party to a contract cannot by repudiation, achieve its unilateral termination, nevertheless when, as here, there is a direct repudiation and denial of the existence of any binding agreement, the other party to the contract is not justified in continuing to make commitments that might change its position. This is especially true, [54] when, as here, it is admitted that whatever discussions took place after this repudiation did not aim at restoring the contract but at liquidating the liability of the defendant through a payment of money to the plaintiff. The next finding is implicit in this.

3. I find that June 6, 1946, is the date as to which the damages should be computed and that the basis of the damage shall be the difference between the contract price of the glucose and the market

price as shown by the record. As already stated, "the damages should be the difference between the contract price and the market price on the date of the final termination of the contract." (Rice v. Schmid, 1941, 18 C(2) 383, 388; Rice v. Schmid, 1944, 25 C(2) 259, 262.)

The situation here is not one in which there is mere refusal to accept an installment delivery. In such case, there is no termination of the contract unless the seller chooses to treat the refusal to accept as ground for termination. Here the contract was repudiated and the defendant specifically denied that any binding contract existed. It is conceivable that, had the plaintiff been induced by the discussions which followed to continue to make purchases, they might insist on a later date as the date of termination. But as that was not done in this case, the contract was at an end on June 6, 1946, and the award of damages for the breach should be made on the basis of the difference between the contract price and the market price of that date.

4. I find that the plaintiff was able to perform the contract and no legal impediment has been shown to exist for its performance. Regardless of the burden of proof, the evidence of an interdiction of export of glucose is, at best, very meagre. There is a showing that some one gave an oral [55] order stopping the export of glucose for a short period of time in line with a certain governmental price policy relating to the cost of living. No official

publication of the order was shown. More, there is no showing that anyone in the Government considered it binding. To the contrary, the evidence shows that during the period of this alleged suspension, the application of the plaintiff for the export license was received. The showing is that, under Argentine law and the custom obtaining, payment of the license does not have to accompany the application, that no notice of action on the application is given unless there is a rejection, and that, in the absence of such rejection, the exporter can pick up the license at any subsequent time when he is ready to export by tendering the fee. There is also evidence in the record that other exporters actually exported glucose during this period. So the upshot of the matter is this: Regardless of any order of cessation of exportation of glucose, the fact remains that glucose was actually exported and that an application for a license to export the glucose involved here was actually received by the proper governmental agency, and not rejected. More, as the alleged order merely suspended for a limited period, its effect, even if proved, would only be to delay performance. Such delay would not destroy the validity of the contract on the ground of frustration. (See, *Patch v. Solar Corporation*, 1945, 7 Cir., 149 F(2) 558.)

Hence the ruling above stated.

Dated this 1st day of February, 1949.

LEON R. YANKWICH,

U. S. District Judge.

[Endorsed]: Filed Feb. 1, 1949. [56]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled cause having come on regularly for trial in the above entitled Court before the Honorable Leon R. Yankwich on the 1st, 2nd, 3rd, 4th and 9th days of June, 1948, and the 27th day of January, 1949, plaintiff appearing by its counsel, Messrs. Stanton & Stanton, and defendant appearing by its counsel, Messrs. Bronson, Bronson & McKinnon, and evidence, both oral and documentary, having been submitted to the Court, and the Court having received briefs of respective counsel and oral argument, and having ordered judgment in favor of plaintiff, [57] now files its findings of fact and conclusions of law in writing, as follows:

Findings of Fact

1. That it is true that jurisdiction in said action is founded upon diversity of citizenship, and that the amount in controversy herein exceeds the sum of \$3,000.00.

2. That it is true that plaintiff is now and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the Republic of Argentina and having its principal place of business within the City of Buenos Aires, Republic of Argentina.

3. That it is true that defendant is now and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of

the laws of the State of Delaware; that on the 20th day of May, 1945, said defendant filed in the office of the Secretary of State of the State of California, a copy of its articles of incorporation duly certified by the Secretary of State of the State of Delaware, together with a statement showing the location and address of its principal office and the location of its principal office within the State of California, with the name and address of a person within the State of California upon whom process directed to defendant may be served, and its irrevocable consent to service upon said person of process issuing from all courts sitting in said State of California, both State and Federal.

4. That it is true that between the 19th day of May, 1946, and the 25th day of May, 1946, a contract was made and entered into between the plaintiff and defendant under and by the terms whereof plaintiff agreed to sell and deliver to defendant, and defendant agreed to purchase and receive from plaintiff 1135 tons of glucose made from pure crystal corn syrup, testing between [58] 43 and 45 degrees Baume, F.O.B. steamship in the Harbor of Buenos Aires, Argentina, at the price of 1.375 Argentina pesos per kilo, packed in wooden cooperage and containing 660 pounds each on a shipping schedule of 50 tons to be shipped in June, 60 tons to be shipped in July, 200 tons to be shipped in August, 150 tons to be shipped in September, 275 tons to be shipped in October, 200 tons to be shipped in November and 200 tons to be shipped in

December, all in the year 1946; that under the terms of said contract, plaintiff undertook to furnish with each shipment a certificate of analysis showing the glucose in each shipment to be of prescribed specifications, and likewise undertook to furnish a certificate of inspection of cooperage; that under and by the terms of said contract, the total purchase price of said glucose was 1,560,625 pesos; that said defendant agreed to make payment of said total purchase price by a letter of credit bearing expiration date of October 1946, at the exchange rate of 335.82 Argentine pesos to 100 American dollars; that said contract was evidenced by four letters in writing passing between plaintiff and defendant respectively on dates May 20th, May 21st, May 22nd and May 23rd, 1946; that a memorandum in writing embodying all of the terms of said contract was signed by said defendant through and by its agent fully authorized so to do in that behalf on or about the 24th day of May, 1946; that the aforesaid exchange rate was a pegged rate fixed by the Argentine Government applicable only to export purchases of glucose of the kind hereinbefore described and bears no relation to the free rate of exchange nor to the total amount of Argentine pesos which plaintiff was entitled to receive from defendant under said contract as the purchase price.

5. That it is true plaintiff entered into contracts for the purchase on the Buenos Aires, Argentine, market, on the 23rd and 24th days of May, 1946, for the whole of said 1135 tons of [59] glucose in

full and true conformity with the terms of said contract heretofore found, and was at all times ready, willing and able to make delivery thereof on board steamship in the Harbor of Buenos Aires, Argentina, at the delivery dates set forth and prescribed in said shipping schedule heretofore found, of all of said glucose so to be delivered; that it is further true that said plaintiff duly performed each and all of the conditions and provisions under said contract to be performed upon its part.

6. That it is true that on the 6th day of June, 1946, defendant repudiated said contract and advised plaintiff that no contract existed between it and plaintiff.

7. That it is true that during the period June 6, 1946, to September 18, 1946, the parties negotiated for a settlement of any liability which might have existed on the part of defendant to plaintiff. Defendant did not actively or continuously or otherwise negotiate with plaintiff during said period or at any other time for the completion or restoration of said contract or deliveries thereunder but at all times maintained its claim that no contract existed between it and plaintiff and at all times definitely refused to accept any deliveries under or pursuant to said contract. At no time did defendant encourage, induce, or otherwise cause or lead plaintiff to defer or postpone any action it might have taken for the disposal of said glucose. On September 18, 1946, in the City of New York, plaintiff made and delivered to defendant a notice in writing of its intention to resell said 1135 tons of glucose.

8. That it is true that during all of the months from May to December, 1946, inclusive, there was an actual open and public market and established market price in the City of Buenos Aires, Argentina for the purchase and sale of glucose of the kind and quality specified in said contract, both for domestic consumption and for export. There was a difference between the [60] market price for such glucose for domestic consumption and the market price for such glucose for export. Such prices bore no continuing fixed or constant relationship to each other. The established market price for such glucose for and during the whole of the month of June, 1946, for export F.O.B. steamship, Buenos Aires, Argentina, was the sum of 1.35 Argentine pesos per kilo, which market price was 15 centavos higher than the then domestic market price of 1.20 Argentine pesos per kilo. The established market price for such glucose for and during the whole of the month of September, 1946, for export F.O.B. steamship, Buenos Aires, Argentina, was the sum of 1.25 Argentine pesos per kilo, which market price was 15 centavos higher than the then domestic price of 1.10 Argentine pesos per kilo.

Under terms of said contract, the purchase price to be paid to plaintiff by defendant for said glucose for export F.O.B. steamship, Buenos Aires, Argentina, was the sum of 1,560,625 Argentine pesos. The total market price for glucose of the same kind and quality as specified in said contract for export F.O.B. steamship, Buenos Aires, Argentina, on

June 6, 1946, was the sum of 1,532,215 Argentine pesos. The difference between said contract price and said market price was and is the sum of 28,375 Argentine pesos. Plaintiff has been damaged as a direct result of the repudiation of said contract by defendant in said sum of 28,375 Argentine pesos.

9. That it is true that the exchange rate of the U. S. Dollar to the Argentine peso on February 2, 1949, was .206 (4.85 pesos to the Dollar). The damage suffered by plaintiff as aforesaid, computed in U. S. Dollars based upon the said rate of exchange as of said date is the sum of \$5,845.25.

10. That it is true that said market values of said glucose are well established and knowledge thereof was at all times acceptable to defendant; and it is further true that the proof [61] of said market values was clear, certain and uncontradicted, and said damages so found as of said 6th day of June, 1946, were of certain calculation; that interest at the legal rate in California at seven (7%) per cent per annum from the 6th day of June, 1946, to the date of judgment herein is the sum of \$1,103.35.

11. That it is true that plaintiff has been engaged in no other transaction in California than the contract hereinbefore found, and that said contract was one in foreign commerce.

12. That it is not true that the export of glucose from the Argentine Republic to any other republic was prohibited either specifically or otherwise by the laws of the Argentine Republic Nos. 12,591 and

12.830 or by any regulations or orders passed or made thereunder during any of the period during which deliveries pursuant to the terms of said contract, as hereinbefore found, were to be made by plaintiff.

13. That it is true that on the 27th day of May, 1946, the application of plaintiff for license to export 935 tons of said glucose was received by the proper authorities of the Argentine Government, the application of plaintiff for license to export 200 tons of said glucose was thereafter and on the 3rd day of July, 1946, received by said authorities, and no rejection of either application was ever made; that it is also true that during the whole of the period covered by the contract heretofore found, glucose was actually exported from Argentina in large quantities by other exporters.

Conclusions of Law

From the foregoing facts as found by the Court, the following conclusions of law are drawn: [62]

1. That the parties hereto between the 19th and 25th days of May, 1946, made and entered into a valid contract of purchase and sale, as found in the findings herein, and that a valid memorandum in writing thereof was subscribed by the agent thereunto duly authorized.

2. That defendant repudiated said contract on the 6th day of June, 1946.

3. That the measure of damage for the breach of contract so made by the parties hereto is the

difference between the contract price and the market price on the date of final termination of the contract, that is to say, the amount heretofore found as \$5,845.25.

4. That plaintiff is entitled to recover interest upon said sum from the 6th day of June, 1946, to date of judgment herein at the rate of seven (7%) per cent per annum, and further entitled to recover its costs.

Dated: This 17th day of February, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

[Endorsed]: Filed Feb. 23, 1949. [63]

In the District Court of the United States for the
Southern District of California, Central Division

No. 6223-Y

COMPANIA ENGRAW COMERCIAL &
INDUSTRIAL S. A., a corporation,
Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,
a corporation,
Defendant.

JUDGMENT

The above entitled cause having come on regularly for trial in the above entitled Court on the 1st, 2nd, 3rd, 4th and 9th days of June, 1948,

and the 27th day of January, 1949, before the Honorable Leon R. Yankwich, Judge presiding, and plaintiff appearing by its counsel, Messrs. Stanton & Stanton, and defendant appearing by its counsel, Messrs. Bronson, Bronson & McKinnon, and evidence, both oral and documentary, having been submitted to the Court, and the Court being duly advised, ordered judgment for plaintiff and therein has filed its findings of fact and conclusions of law in writing, [64]

Now, Therefore, by reason of the premises and of the findings of fact and conclusions of law aforesaid,

It Is Ordered, Adjudged and Decreed that plaintiff, Compania Engraw Comercial & Industrial S. A., a corporation, have and recover of and from defendant, Schenley Distillers Corporation, a corporation, the sum of \$5,845.25, together with interest from June 6th, 1948, to the date of judgment, in the amount of \$1,103.35, a total of \$6,948.60.

It Is Further Ordered, Adjudged and Decreed that plaintiff, Compania Engraw Comercial & Industrial, S. A., a corporation, do have and recover of and from defendant, Schenley Distillers Corporation, a corporation, its costs herein incurred, hereby taxed in the sum of \$850.70.

/s/ LEON R. YANKWICH,
U. S. District Judge.

[Endorsed]: Filed Feb. 23, 1949.

Judgment entered Feb. 24, 1949.

Docketed Feb. 24, 1949. [65]

[Title of District Court and Cause.]

NOTICE OF MOTION UNDER RULE 52-b

To Messrs. Bronson, Bronson & McKinnon, Attorneys for Defendant, Mills Towers, San Francisco, California:

Please Take Notice that the undersigned will bring the above motion on for hearing before the Honorable Leon R. Yankwich, a Judge thereof, in the Federal Building in the City of Los Angeles, State of California, on the 14th day of March, 1949, at 10 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard.

Said motion will be made upon the ground that said amendments are necessary to conform the findings to the evidence in said case and will be made upon the files, records and minutes of the Court upon the motion served and filed herewith and the points and authorities attached hereto upon this motion.

Dated: This 3rd day of March, 1949.

STANTON & STANTON,
By /s/ LOUIS B. STANTON,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 4, 1949. [66]

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS
UNDER RULE 52-b

The plaintiff in the above entitled action moves the Court as follows:

To amend the findings heretofore filed on the 23rd day of February, 1949, in the particulars as hereinafter stated, and to make additional findings, as hereinafter stated, and to amend the judgment accordingly.

(a) Delete the last clause of Finding 4, commencing on Line 24 of said finding and running to the last line thereof, reading as follows:

“That the aforesaid exchange rate was a pegged rate fixed by the Argentine Government applicable only to export purchase of glucose of the amount hereinbefore described and bears no relation to the free rate of exchange nor to the total amount of Argentine pesos which plaintiff was entitled to receive from defendant under said contract as the purchase price.”

(b) Delete that portion of Finding 7, commencing on Line 21 thereof and ending with the word “glucose” on Line 24 thereof, reading as follows:

“At no time did defendant encourage, induce or otherwise cause or [67] lead plaintiff to defer or postpone any action it might have taken for the disposal of said glucose.”

(c) Delete from Finding 8 the phrase commencing on Line 31, page 4, reading as follows:

“Both for domestic consumption and for export.”

(d) Delete from Finding 8, the sentence commencing on Line 32; page 4, reading as follows:

“There was a difference between the market price for such glucose for domestic consumption and the market price for such glucose for export.”

(e) Delete from Finding 8, the sentence commencing on Line 32, page 4, reading as follows:

“There was a difference between the market price for such glucose for domestic consumption and the market price for such glucose for export.”

(f) Delete from Finding 8, page 5, Line 2, the sentence commencing thereon and reading as follows:

“Such prices bore no continuing fixed or constant relationship to each other.”

(g) Delete from Finding 8, page 5, Line 3, the sentence, reading as follows:

“The established market price for such glucose for and during the whole of the month of June, 1946, for export f.o.b. steamship Buenos Aires, Argentina, was the sum of 1.35 Argentine pesos per kilo, which market price was 15 centavos higher than the then domestic market price of 1.20 Argentine pesos per kilo.”

(h) Insert therein the following:

“The established market price for such glucose for and during the whole of the month of June, 1946, was the sum of 1.20 Argentine pesos per kilo; that the fair and reasonable cost of transference from the Buenos Aires market to place on board steamship Buenos Aires and including stevedoring, transportation, cooperage, taxes [68] and all other

expenses incidental to said transfer was the sum of 15 centavos per kilo.”

(i) Delete from Paragraph 8 of the said Findings, the sentence commencing on Line 9, Page 5 thereof, reading as follows:

“The established market price of such glucose for and during the whole of the month of September, 1946, for export f.o.b. to steamship Buenos Aires, Argentina, was the sum of 1.25 Argentine pesos per kilo, which market price was 15 centavos higher than the then domestic price of 1.10 Argentine pesos per kilo.”

(j) As an alternative to the deletion of the sentence set forth in Paragraph (i) last above, delete the figures 1.25 from Line 11, Page 5, and insert in place thereof, the figure “60”; also delete the figure 1.10 in Line 13, Page 5, and insert in place thereof the figure “75”.

(k) Insert in Finding 8, Line 20, Page 5, after the figure “1946”, the following:

“Including cost of transference from Buenos Aires market to on board steamship Buenos Aires Harbor at the rate of 15 centavos per kilo, as heretofore found.”

(l) In Finding 8, Page 5, Line 22, and Line 24, delete the figure “28,375”, and insert in place thereof the figure “28,410”.

(m) In Finding 9, Page 5, Line 29, delete the figure “\$5845.25,” and insert the figure “\$5852.44” in place thereof.

(n) In Finding 10, Page 6, Line 6, delete the

figure "1,103.35", and insert in place thereof the figure "\$1,111.71".

(o) In Finding 12, Page 6, Line 12, delete the word "Republic" and insert the word "country".

(p) Amend said findings by adding thereto the following:

"That it is true that the market price for glucose of said quality and specifications at and in said Buenos Aires market the whole month of June, 1946, was the sum of one (1) peso twenty (2) centavos; that thereafter, commencing with the month of July 1946, the market price broke, so that the market price for glucose of said specifications [69] for the period from the 1st of July, 1946, to the 1st of January, 1947, was the sum of 60 centavos per kilogram; that said market price for glucose of said specifications continued to drop so that in the month of April, 1947, the market price for glucose of said specifications in said Buenos Aires market was the sum of 52 centavos per kilogram; that it is true that the cost of transference of glucose from the Buenos Aires market to free on board steamer in Buenos Aires Harbor, packed ready for delivery and including all costs for taxes, stevedoring, coo-perage and transportation, was the sum of 15 centavos per kilogram."

That the judgment herein be amended in the following particulars:

(a) Strike the figure \$5,845.25 on line 6, page 2 thereof, and insert in place the figure \$5,852.46.

(b) Strike the figure \$1,103.35 in line 8, page 2, and insert in place thereof the figure \$1,111.71.

(c) Strike the figure \$6,946.60, in line 8, page 2 of said judgment, and insert in place thereof the figure \$6,964.17.

STANTON & STANTON,
By /s/ LOUIS B. STANTON,
Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed Mar. 4, 1949. [70]

[Title of District Court and Cause.]

NOTICE OF MOTION TO ALTER AND
AMEND JUDGMENT UNDER RULE 59-e.

To: Messrs. Bronson, Bronson & McKinnon, Attorneys for Defendant, Mills Towers, San Francisco, California:

Please Take Notice that the undersigned will bring the above motion on for hearing before the Honorable Leon R. Yankwich in the Federal Building in the City of Los Angeles, State of California, on the 14th day of March, 1949, at 10 o'clock in the forenoon of that day or soon thereafter as counsel can be heard.

Dated: This 3rd day of March, 1949.

STANTON & STANTON,
By /s/ LOUIS B. STANTON,
Attorneys for Plaintiff.

[Endorsed]: Filed March 5, 1949.

[Title of District Court and Cause.]

MOTION TO ALTER OR AMEND JUDGMENT
UNDER RULE 59-e, F.R.C.

The plaintiff in the above entitled action moves the Court as follows:

That the judgment in the above entitled action be amended and altered in accordance with the findings, prices and market values, as more particularly set forth in the proposed amendment to findings served and filed contemporaneously herewith, under the provisions of Rule 52-b, and that said judgment be altered and amended so as to truly set forth the amount of damages payable to plaintiff herein on the respective dates of deliveries of the glucose, as specified in the contract between the parties hereto and particularly found in Paragraph 4 of the findings herein.

STANTON & STANTON,
By /s/ LOUIS B. STANTON,
Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed March 5, 1949. [78]

[Title of District Court and Cause.]

ORDER DENYING MOTIONS UNDER
RULE 52-b AND 59-e.

The above entitled case came on regularly for hearing before the Honorable Leon R. Yankwich, United States Judge, on the 14th day of March, 1949, and Messrs. Stanton & Stanton appearing as attorneys for plaintiff, and Messrs. Bronson, Bronson & McKinnon appearing as attorneys for defendant. After argument and being fully advised in the premises, the Court made an order denying the respective motions, and therefore,

It Is Ordered, Adjudged and Decreed that the motion of plaintiff to alter and amend the findings under Rule 52-b be and it hereby is denied.

It Is Ordered, Adjudged and Decreed that the motion of plaintiff to alter and amend the judgment under Rule 59-e be and it is hereby denied.

Dated: This 21st day of March, 1949.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed March 21, 1949.

Copy received. [82]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above Entitled Court, to Defendant Schenley Distillers Corporation, and to Messrs. Bronson, Bronson & McKinnon, Attorneys for Said Defendant:

You and Each and Every of You Will Please Take Notice that Compania Engraw Comercial E. Industrial S. A., a corporation, plaintiff in the above entitled action, does hereby appeal to the Court of Appeals, for the Ninth Circuit, from that final judgment rendered by the above entitled Court in the above entitled cause, and entered and docketed on the 24th day of February, 1949 in Book 56 of Judgments, at Page 279 thereof, and from the whole of said judgment.

Dated: This 11th day of April, 1949.

STANTON & STANTON,
By /s/ LOUIS B. STANTON,
Attorneys for Plaintiff and
Appellant.

Copy received.

[Endorsed]: Filed April 12, 1949. [83]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that defendant above named hereby appeals to the Circuit Court of Ap-

peals for the Ninth Circuit from the final judgment in favor of plaintiff above named and against said defendant, entered in this action on February 24, 1949.

Dated: April 11, 1949.

BRONSON, BRONSON &
McKINNON,
/s/ EDGAR H. ROWE,
Attorneys for Defendant and
Appellant.

Receipt of copy acknowledged.

[Endorsed): Filed April 12, 1949. [84]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk of the Above Entitled Court, to Defendant Schenley Distillers Corporation, and to Messrs. Bronson, Bronson & McKinnon, Its Attorneys:

You and Each of You Will Please Take Notice that, in accordance with the provisions of Subdiv. (a) of Rule 75 of the Federal Rules of Civil Procedure, appellant hereby designates portions of the record, proceedings and evidence to be contained in the record on appeal, as follows:

Pleadings and Proceedings

1. Amended complaint.
2. Amendment to amended complaint.
3. Order permitting filing of amendment to amended complaint.
4. Answer to amended complaint.
5. Findings of fact and conclusions of law, together with the direction of the entry of judgment thereon.
6. Opinion of the Court.
7. Judgment.
8. Motion to amend findings under Rule 52-b.
9. Motion to alter and amend judgment under Rule 59-e.
10. Order denying motions under Rule 52-b and 59-e.
11. Notice of appeal with date of filing.

Evidence

1. All original exhibits filed in said action, all of which are hereby requested to be transmitted to the United States Court of Appeals for the Ninth Circuit.

2. Entire Reporter's Transcript of testimony taken on the trial of said action.

That plaintiff and appellant does hereby request, in accordance with the provisions of Rule 75-o

of the Federal Rules of Civil Procedure and in accordance with the provisions of Rule 11-1 of the Rules of the United States Court of Appeals for the Ninth Circuit, that all documents on file in the above entitled Court, as hereinbefore designated, be transmitted under the certificate and seal of the Clerk of the above entitled Court to said United States Court of Appeals for the Ninth Circuit, and form a record on appeal in the above entitled Court.

Dated: This 11th day of April, 1949.

STANTON & STANTON,

By /s/ LOUIS B. STANTON,

Attorneys for Plaintiff and
Appellant.

[Endorsed]: Filed April 12, 1949. [87]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto that all exhibits introduced in evidence in the above entitled action, together with any depositions on file herein, together with any translations of any of the foregoing, may be transmitted from the District Court of the United States for the Southern District of California to the United States Court of Appeals, Ninth Judicial Circuit.

Dated: April 13, 1949.

STANTON & STANTON,
By /s/ LOUIS B. STANTON,
Attorneys for Plaintiff and
Appellant.
/s/ BRONSON, BRONSON &
McKINNON,
/s/ EDGAR H. ROWE,
Attorneys for Defendant and
Appellee.

Copy received.

[Endorsed]: Filed April 13, 1949. [88]

[Title of District Court and Cause.]

ORDER

Pursuant to the stipulation of the attorneys for the respective parties hereto, and good cause appearing therefor,

It Is Hereby Ordered that all exhibits introduced in evidence in the above entitled action, together with any depositions on file herein, together with any translations of any of the foregoing, be transmitted from the District Court of the United States for the Southern District of California to the United States Court of Appeals, Ninth Judicial Circuit.

Dated: April 13th, 1949.

/s/ PAUL J. McCORMICK,
U. S. District Judge.

Copy received.

[Endorsed]: Filed April 13, 1949. [89]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the Above Entitled Court, to Plaintiff *Compania Engraw Comercial & Industrial S. A.*, and to Messrs. Stanton & Stanton, Its Attorneys:

You and Each of You Will Please Take Notice that, in accordance with the provisions of Subdiv. (a) of Rule 75 of the Federal Rules of Civil Procedure, appellee hereby designates portions of the record, proceedings and evidence to be contained in the record on appeal, as follows:

Pleadings and Proceedings

1. Original complaint.
2. Defendant's motion to dismiss and order denying same. [90]
3. Amended complaint.
4. Defendant's motion to dismiss and order denying same.
5. Amendment to amended complaint.
6. Order permitting filing of amendment to amended complaint.
7. Answer to amended complaint.
8. Findings of fact and conclusions of law, together with the direction of the entry of judgment thereon.

9. Decision and Comment (opinion) of the Court.

10. Judgment.

11. Motion to amend findings under Rule 52-b.

12. Motion to alter and amend judgment under Rule 59-e.

13. Order denying motions under Rule 52-b and 59-e.

14. Notice of appeal with date of filing.

Evidence

1. All original exhibits filed in said action, all of which are hereby requested to be transmitted to the United States Court of Appeals for the Ninth Circuit.

2. Entire Reporter's Transcript of testimony taken on trial of said action, including all depositions used or filed.

That defendant and appellee does hereby request, in accordance with the provisions of Rule 75-o of the Federal Rules of Civil Procedure and in accordance with the provisions of Rule 11-l of the Rules of the United States Court of Appeals for the Ninth Circuit, that all documents on file in the above entitled Court, as hereinbefore designated, be transmitted under [91] the certificate and seal of the Clerk of the above entitled Court to said United States Court of Appeals for the Ninth Circuit, and form a record on appeal in the above entitled Court.

Dated: This 13th day of April, 1949.

/s/ EDGAR H. ROWE,
BRONSON, BRONSON &
McKINNON,

Attorneys for Defendant and
Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed April 13, 1949 [92]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 92, inclusive, contain the original Complaint; Notice of Motion and Motion to Dismiss and Motion to Make More Definite and Certain filed February 10, 1947; Amended Complaint; Notice of Motion and Motion to Dismiss and Motion to Make More Definite and Certain and Points and Authorities in Support Thereof filed August 20, 1947; Answer to Amended Complaint; Notice of Motion to File Amendment to Amended Complaint; Amendment to Amended Complaint; Decision; Findings of Fact and Conclusions of Law; Judgment; Notice of Motion and Motion to Amend Findings Under Rule 52-b; Notice of Motion and Motion to Alter and Amend Judgment Under Rule 59-e; Order Denying Mo-

tions Under Rules 52-b and 59-3; Separate Notice of Appeal of Plaintiff and Defendant; Plaintiff's Designation of Contents of Record on Appeal; Stipulation; Order re Exhibits; Defendant's Designation of Contents of Record on Appeal and Full, true and correct copies of Minute Orders entered February 24, 1947, August 25, 1947 and September 20, 1948 which, together with original reporter's transcript of proceedings on June 1, 2, 3, 4 and 9, 1948 in eight volumes, original plaintiff's exhibits Nos. 1 to 21, inclusive, 21-A to 21-G, inclusive, 22 to 59, inclusive, 59-A, 60, 60-A to 60-G, inclusive, 61 to 71, inclusive, 71-A and 71-B, original defendant's exhibits A to R, inclusive, R-1 to R-3, inclusive, S, T, T-1, T-2, T-3, U and V, and original depositions of G. Fred Berger, Robert H. Baglin and Harold A. Whipple, in two volumes, transmitted herewith, constitute the record on appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$3.20, one-half of which sum has been paid to me by each of the parties.

Witness my hand and the seal of said District Court this 16th day of May, A.D. 1949.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto that the time for filing the record on appeal in the above entitled case in the office of the Clerk of the United States Court of Appeals for the Ninth Circuit may be extended to and including the 17th day of June, 1949.

Dated: May 17th, 1949.

STANTON & STANTON,
By /s/ LOUIS B. STANTON,
Attorneys for Plaintiff,

BRONSON, BRONSON &
McKINNON,
/s/ EDGAR H. ROWE,
Attorneys for Defendant.

It Is So Ordered.

Dated: May 17th, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

In the District Court of the United States for the
Southern District of California, Central Division

No. 6223-Y Civil

COMPANIA ENGRAW COMERCIAL E.
INDUSTRIAL S. A.,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION, a
corporation,

Defendant.

Honorable Leon R. Yankwich, Judge, presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

Tuesday, June 1, 1948

Appearances:

STANTON & STANTON,
LOUIS B. STANTON, ESQ.,
EDWARD B. STANTON, ESQ.,
JOHN L. WELBOURN, ESQ.,

For the Plaintiff.

BRONSON, BRONSON & McKINNON,
E. D. BRONSON, ESQ.,
EDGAR H. ROWE

For the Defendant.

(Case called by the clerk.)

Mr. Rowe: May it please the court, before the
actual commencement of the case I have a motion
I would like to make, with your Honor's permis-

sion. At this time the defendant Schenley Distillers Corporation, a corporation, moves this court for an order dismissing the complaint and each cause of action thereof upon the ground that neither of the causes of action set forth in the complaint states a claim against the defendant upon which relief can be granted.

This motion is based upon the ground, your Honor, that the complaint in each cause of action is based upon what is alleged to be a written copy. The copy of the contract is attached to the complaint and made a part of each cause of action. The allegations of the complaint go beyond the provisions of what is alleged to be the contract of the document which is attached to the pleading, and it is upon that ground that the defendant contends the action should be dismissed.

If your Honor will look at Paragraph V of the amended complaint, I can point out to you more specifically exactly what the basis of this motion is.

The Court: All right. The amended complaint filed [3*] August 4th, 1947?

Mr. Rowe: Yes, your Honor.

The Court: What paragraph are you referring to?

Mr. Rowe: Paragraph V; and I might add that Paragraph V is the same in each cause of action, so that the reference to this one will answer the point in the motion as to both. You will notice that Paragraph V of the pleading alleges:

* Page numbering appearing at top of page of original certified Transcript of Record.

“That on or about the 23rd day of May, 1946, consequent upon oral and written offers a contract in writing was made and entered into by plaintiff on the one part and defendant on the other part, under and by the terms whereof plaintiff agreed to sell and deliver to defendant, and defendant agreed to purchase and receive from the plaintiff, f.o.b. steamship at Buenos Aires, Republic of Argentina, 1135 tons of glucose, made from pure, crystal clear, corn syrup and testing between 43° and 45° Baume, at 1.375 Argentine Pesos per kilo, packed in wooden cooperage, containing approximately 660 pounds each, and delivered to McCormick Steamship Company at Buenos Aires for carriage to San Francisco or Los Angeles, California, under shipping schedule as follows:”

Reference to the shipping schedule may be omitted for the purpose of this motion. [4]

“and further agreed to make payments for the total purchase price of said glucose on or before the 30th day of October, 1946, at the rate of 335.82 Argentine Pesos to 100 American dollars, and thereby defendant agreed to pay the plaintiff the sum of \$464,-720.68; that a true and correct copy of said contract is hereto attached, marked ‘Exhibit A’ and hereby specifically referred to as if herein set forth at length.” [4-A]

If your Honor will look at Exhibit A which is attached to the complaint and compare its language or its provisions with the allegations, you will note that there are several averments in this Paragraph

V which go beyond the provisions of the Exhibit A. In the first instance, Paragraph V alleges that this is a contract in writing, and it alleges that under and by its terms plaintiff agreed to sell and deliver to defendant, and defendant agreed to purchase and receive from plaintiff. Now, Exhibit A is completely devoid of any language which would impose an obligation upon plaintiff to sell defendant any merchandise whatsoever, glucose or anything else.

Nowhere in Exhibit A is any obligation cast upon plaintiff in anyway, shape, manner or form; and that, your Honor, is the first statement of this allegation which goes beyond the actual provisions of the contract upon which this suit is based.

The second point of divergence which is most apparent is the allegation toward the latter part of Paragraph V, that defendant agreed to pay plaintiff for this glucose at the rate of 335.82 Argentine pesos to one hundred American dollars. There is nothing like that in Exhibit A whatsoever.

The absence of those two material matters in Exhibit A make it necessarily follow that if plaintiff has a contract at all upon which it can complain against defendant, that [5] contract is not a written contract as it is alleged to be in this complaint, but it is actually an oral contract.

The Court: Of course, the answer is two-fold or two-pointed, to be correct. It is not to be handled by a motion of this character because, while the rules say that any matter may be raised at any time which challenges the sufficiency of the claim, the

interpretation of the rule and the practice is to raise the point of sufficiency after the plaintiff's case has been presented, because until that time we do not have the exhibit before the court.

The second point is this: That a mere omission of certain terms or a mere overstatement of the effect of an instrument does not in itself destroy the complaint. Assuming that the contract is one within the statute of frauds, the rules are that if there is an agreement sufficient to bind, and the type of goods, the price and the like, the agreement does not fall by the wayside merely because some detail like manner of payment and the like are missing.

In dealing with contracts relating to personal property we are not bound by the strict rules which obtain if we are dealing, say, with an agreement to buy real property, because there, not only must the property be identified and the price given, but the manner of payment, the manner of security, and the like. This is especially true when the instrument on which they rely is an answer to an offer, and the books are [6] full of cases under the California Statute of Frauds, assuming this is governed by California law, and the California Statute of Frauds in that respect merely follows the general rule that memorandum sufficient to satisfy the requirement of the Statute of Frauds be contained in one instrument. It may be contained in several instruments. So that until we see all the instruments relating to the transaction, this letter just referred to and the other letter of May 21st, we are

not in a position to say whether we have an agreement which is sufficient to satisfy the Statute of Frauds. [7]

Mr. Rowe: Well, my point, your Honor, is a little different from that. Perhaps I have not made myself completely clear, and I don't want to labor it. The complaint is based upon a contract in writing. There is no suggestion that this case is to be presented wherein the plaintiff claims upon an oral contract with the written memorandum to take it under the statute of frauds, and that is the point of our motion.

The Court: We don't have a theory of pleading in California, we have never had it and there is certainly no such thing as a theory of pleading at the present time under the Federal rules—the rule is that regardless of the manner of pleading, if the facts entitle a person to recover, he is entitled to recover, so that even under the California law, if a person can allege a contract within the statute of frauds and then prove a memorandum—

Mr. Rowe: I agree with that theory, and I am not trying to argue that point. All I am trying to argue at this moment is this: If the plaintiff claims he has a written contract with the defendant, that contract obviously is not included in the letter which is attached to the complaint as an exhibit.

The Court: That does not make any difference. If the contract is inadequate, the Court will allow material matters to be supplied. It is not a rule that the man who relies on a contract cannot supply

details, in addition to that, as to [8] the manner, say for instance of payment, so long as it is agreed as to price, and even price is sometimes not material, because if a man says, "I agree to buy this," the presumption is that the current market price will be paid, just as if a person comes to your yard and says, "Your yard needs cutting," and you tell him to go ahead and cut it, the law will presume he wasn't intending to do it—the law will presume you engaged him to do it for compensation and that he will receive the reasonable value therefor.

Mr. Rowe: Yes, your Honor. I am not talking about the manner and various ways in which this thing might have been pleaded, but I am trying to come to the point of the manner in which it has been pleaded.

The Court: It does not make any difference. He pleaded a contract and the memorandum is the written contract.

Mr. Rowe: Aren't we entitled to have a part of the pleading the written offers which go to fill out a contract?

The Court: No, not under our system of pleading. Federal pleading, at the present time is practically notice pleading, and the additional information you may secure by interrogatories, you may secure them by motion for a more definite statement; the Bill of Particulars has just been abolished under the Federal rules which went into effect on the 19th of March. The Bill of Particulars is abolished. But at the time that this action was

instituted, the old [9] rule provided for a Bill of Particulars in a civil case. So that it is not a ground of insufficiency that he does not supply you with all the information that you may need for the purposes of the case, because the broad discovery rule, one of which I have enumerated, the motion for a more definite statement, interrogatories, depositions and the like are at your command, in order to secure the additional information which you may need.

Mr. Rowe: Well, but, your Honor, for the conduct of a trial of a case of this kind, it is obvious, I think, that from our standpoint, the conduct of our case and of our objections, we will call it, to testimony that the plaintiff might offer would be materially different. For example, if this contract were completely in writing, that is it, that is the commencement of it and that is the end of it. If it is partly oral and partly written, it is entirely oral and this document is not the commencement or the end of it.

The Court: Well, that objection comes too late and it does not go to the sufficiency of the pleadings. That objection merely expostulates the proposition that had you been given this information, you might have been prepared on some matters on which you are not prepared. The answer is this: This case has been pending for a year and a half, in fact longer. You have had ample opportunity to use all the agencies of the rules of Civil Procedure, to secure that [10] information.

Mr. Rowe: We have used an awful lot of those rules.

The Court: I know you have. You have. Is there any other point?

Mr. Rowe: No.

The Court: The motion is denied, for the reasons already indicated. All right, proceed, gentlemen.

Mr. L. B. Stanton: Does your Honor desire a statement of the case?

The Court: If you wish to.

The Clerk: Your Honor, there is a motion here, motion plaintiff for preliminary hearing on two of the defenses in answer.

The Court: Well, that we will continue to the presentation of the defendant's testimony. Counsel may raise the points when testimony is offered in support of those defenses. All right.

Mr. L. B. Stanton: If your Honor please, this case is brought upon diversity of citizenship.

The defendant Schenley Distillers Corporation is incorporated under the laws of Delaware.

The amount involved is \$245,000.00.

The plaintiff is incorporated under the laws of the Argentine Republic and found the defendant in this State. The defendant is domesticated in this State and therefore was [11] entitled to be sued here.

The case arises from a contract, as we allege, for the purchase of 1,135 tons of glucose. This contract was initiated—the negotiations were initiated in

May of 1946, by one Harold A. Whipple, who was an export and import agent acting for the plaintiff in vending its merchandise in California.

There were two letters from Mr. Whipple to the Schenley Distillers and there were two letters from Schenley Distillers which will be produced in evidence, which essentially form the elements of the contract to purchase upon which we rely.

Under the contract it was required that the Schenley Distillers forward a letter of credit to the plaintiff in Argentine. This was never done.

On June 6, 1946, the Schenley Distillers, through their agent, Secretary James E. Woolsey, notified Mr. Whipple that they were not going to enter into any contract. There had been notice from the plaintiff to the Schenley Distillers in their headquarters, I presume in Cincinnati, of the details of the contract, by wire.

The plaintiff purchased or had purchased from the exporters in Buenos Aires the required amount of glucose to fill this contract.

Incidentally, I might remark that the proof will show that later, in making the contract about May 28th, there was [12] an oral contract for the purchase of some 400 tons of glucose. We are not counting on that oral contract, because, of course, we appreciate that there was no memorandum in writing. I simply make that statement because the evidence will show that we purchased 1,535 tons of glucose in the Argentine and that accounted for the 400 tons.

This merchandise was purchased in the Argentine under contracts for deliveries as correspond with the delivery dates that are specified in the contract made.

Upon the refusal or—after the June 6th contract, June 6th notification had been made to the plaintiff, plaintiff and Schenley Distillers entered into various negotiations (at least I will term them negotiations). Schenley Distillers sent a man by the name of Emanuel Dichter to Buenos Aires, who investigated the situation there, and they had various correspondence between them.

Mr. Berger, the president of the plaintiff corporation, came to New York and they had consultations there, and those consultations finally developed, on September 20th, in a definite refusal of the Schenley Distillers to take any further action on the contract as we allege.

Various litigation developed between the plaintiff and their suppliers in Buenos Aires, which seems to be immaterial in this case, but, in April of 1947 the merchandise was finally disposed of and at that time the amount of damages [13] were determined.

Now, our rule of measure of damage in this case—it might be interesting to the Court to know at this time—is based upon two California cases, the 18 Cal. (2d) and the 25 Cal. (2d), *Rice v. Schmid*, whereas it is stated that the rule of damage in that case is the difference between the contract price and the market price of merchandise in the place

where it was delivered. Those cases are based, further, upon a case, *Burton Coal Company v. United States*, which went to the United States Court and was so determined.

The Court: Do you gentlemen have anything to present at this time?

Mr. Bronson: Not at this time, your Honor.

The Court: Call your first witness.

Mr. E. B. Stanton: Will the defendant stipulate that the plaintiff is an Argentine corporation?

Mr. Bronson: We haven't any information on it. We understand that you have some record of it. That may go in, without objection.

Mr. L. B. Stanton: I may further state, your Honor, that there will be brought in here various Spanish documents and I have had quite a little difficulty with Spanish translators, and I have translated them myself. They are, of course, subject to approval of counsel. I will furnish counsel with a copy of the translations and I assume if there are any corrections, he can have them made.

The Court: Well, as you know, I know the Spanish language myself and while my spoken Spanish may not be current, my knowledge of written Spanish is pretty extensive and covers the classical language, including the modern variations, may I say, so that it extends—it does not include any knowledge of certain idioms, because I realize in South America some idioms are used. I have just recently read a famous novel from

Venezuela, and there are many idioms there, even by Spanish speaking people. There are two pages of glossary, and of course, when that is the case, then, a person who has learned the language away from the country may not know the idioms, I understand, and I have had a good deal of experience with documents, mostly from Mexico. They are written in what might be called the classical Spanish, and they do not refer to any—do not use any of the idioms.

Mr. L. B. Stanton: I think that is very correct, your Honor.

The Court: So that I will be glad to assist you in any manner I can in checking these translations against the originals.

I know that in one case, a very famous mail fraud case, United States against Carrillo, there were 122 documents and because counsel in that case spoke Spanish, they agreed that I should do the translating and it was quite a difficult job [15] to do it, especially before a jury, because you have to do it very fast. I am merely referring to that, but not as a matter of boasting, gentlemen, but I have spoken several languages so long, it is not a question of boasting. To me, they are merely an aid, an added knowledge that I can use, both for inserts and also for enjoyment, when I have time for enjoyment. So I will be glad to do it. However, if you have any Spanish speaking witnesses, they will have to speak through the official interpreter. I do not allow private interpretations.

Mr. L. B. Stanton: We have no objection.

The Court: All right.

Mr. E. B. Stanton: Mr. Fred Berger. I am calling Mr. Berger for the sole purpose of introducing the articles——

Mr. Bronson: I don't think you need to do that. You have various certificates there. You have a translation, as I said a moment ago.

Mr. E. B. Stanton: You are interposing no objection to the admission of them?

Mr. Bronson: And I don't think you need any identification of that. Just state what they are.

Mr. E. B. Stanton: Then, I file as plaintiff's first exhibit the original, together with translation of the document purporting to be a certified copy of the permit wherein Engraw, plaintiff, operates as a corporation in Buenos Aires, [16] in Argentine.

The Court: All right. It may be received in evidence.

The Clerk: Plaintiff's Exhibit 1 in evidence.

PLAINTIFF'S EXHIBIT No. 1

(English Translation)

Translation: S. M. Minister of Justice and Public Instruction of the Argentine Nation.

2 Pesos Documentary Stamp, Canceled.

Rubber Stamp of Department of Justice.

Indistinguishable figures, apparently 541185.

Department of Justice Rubber stamp. The seal of the nation, 2. 18 March, 1948. Buenos Aires, 16th of March, 1945. 16 Mar. 1945.

Exp. n° 7687/944.—

Whereas, request for authorization for the incorporation of the corporation “Compania Engraw Comercial e Industrial S. A.” and the favorable order of the Inspector General of Justice.

In view of the fact that in the organization of said corporation there have been fulfilled the requirements of Article 318 of the Code of Commerce and in further view of the fact that its by-laws and modifications suggested by the Inspector General and accepted by said corporation are in accord with the local requirements and rules now in effect.

The President of the Argentine Nation decrees:
Art. 1st—Let it be authorized to function as a corporation in view of the fulfillment of Article 319 of said code in the terms of Article 21 of the regulatory decree of the Inspection General of Justice, the corporation “Compania Engraw Comercial E Industrial S. A.,” organized in this capital the 7th day of August, 1944, and let its by-laws from pages 2 to 11 be approved with the modifications made on pages 27 to 29 and 33.

Art. 2nd—Let it be published that it be given to the National Register.

Let there be issued an order for the return of moneys, the deposit of which is evidenced with the ticket on page 16, and the reference of the Inspection General of Justice for its annotation. Issuance of testimony shall effect. Let the pages be returned.

[Indistinguishable signature.]

[Indistinguishable rubber stamp.]

Decree Number 5861-45.

[Indistinguishable signature.]

Minister of Justice and

Public Instruction of the Nation

Rubber Stamp "Copied" Bco. Nation—26—Sallio 3/4/945.

EDUARDO M. VASQUEZ,

Eduardo M. Vasquez, 1st Chief Office
of the Minister of Justice.

[Indistinguishable signature Rubber Stamp "Inspection 3 Apr. 1945.]

Cer / / / / /

Mr. E. B. Stanton: Mr. Harold Whipple, come forward.

HAROLD A. WHIPPLE

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. E. B. Stanton:

Q. What is your name, please?

A. Harold A. Whipple.

Q. What is your residence address, Mr. Whipple?

A. 1416½ Quintero Street, Los Angeles.

Q. And your business or occupation?

(Testimony of Harold A. Whipple.)

A. Importer and exporter.

Q. By whom are you employed?

A. By myself.

Q. Under what name do you operate?

A. Harold A. Whipple Company.

Q. Where is that located?

A. 228 South San Pedro Street, Los Angeles.

Q. How long have you been operating?

A. Oh, for in excess of 20 years.

Q. Can you explain to the Court, in general, your type of business operations that you maintain? [17]

A. Why, we act in a variety of capacities, as import broker, export broker, as an import merchant and an export merchant. At times we act as exclusive agent for American manufacturers and suppliers. Sometimes we act as agent for foreign suppliers in the California market.

Q. Do you know the plaintiff in this action, Engraw?

A. Yes, sir.

Q. How long have you known of that firm?

A. Since sometime in 1945.

Q. Do you know any of the members of the firm?

A. Yes, sir.

Q. Who?

A. Mr. Fred Berger.

Q. Do you know his position with the firm?

A. President.

Q. Do you know the defendant corporation, the Schenley Distillers?

A. Yes, sir.

Q. Have you had any business dealings with them, any occasion for such?

A. Yes, sir.

(Testimony of Harold A. Whipple.)

Q. In what regard?

Mr. Bronson: I object to that, if it has to do with this contract.

The Court: I will permit it merely to show the relationship. [18] Go ahead.

A. In 1946, in negotiations for sale of glucose.

Mr. Bronson: I did not hear the response.

(Answer read by reporter.)

Q. (By Mr. E. B. Stanton): Approximately when in 1946 did these negotiations take place?

A. It would be in May, about, well, starting in the middle of May.

Q. Where did those activities take place?

A. In Los Angeles.

Q. Prior to that time, prior to about the middle of May of 1946, have you had any dealings in glucose whatsoever?

A. I have had negotiations in glucose, yes.

Q. Here in California? A. Yes.

Q. What type of negotiations?

A. I had negotiated with various manufacturers for the sale of glucose for the account of the Engraw Corporation.

Q. What was your first contact with Schenley Corporation or any member of the Schenley Corporation regarding these negotiations to which you have testified?

A. On May 14, 1946, I received a phone call from a Mr. J. B. Donnelly, who introduced him-

(Testimony of Harold A. Whipple.)

self as being a representative of the Schenley Corporation.

Q. Now, relate to the Court in general as well as you [19] can remember the substance of that conversation.

A. Mr. Donnelly said that he was informed that we had glucose available and he would like in detail what we had to offer. I informed him that we did; and that a short time previously my principals in Buenos Aires had available 1300 tons; that I had had negotiations, in fact at the moment I had negotiations on for 300 tons of it which I would consider under option until those were completed.

Q. You mean to somebody else?

A. To someone else, yes, which would leave, so far as I knew at the moment, 1000 tons available subject to it being still unsold. I gave him a detail of the packing, the specifications, that is, that it was 43 to 45 Baume crystal clear corn syrup.

Q. Just a moment, Mr. Whipple, will you explain what you mean by that, 43 to 45 Baume?

A. I think that is an answer for a chemist, Mr. Stanton. 43 to 45 Baume is the degree of sugar content. How it is determined I would not attempt to say.

Q. I see. Anything further in that conversation?

A. He asked about the price and I gave him an approximate landed price which I told him should

(Testimony of Harold A. Whipple.)

not exceed 22.3 cents a pound. I believe at that conversation or possibly in a succeeding one I explained to him that the purchase would be made f.o.b. Buenos Aires; that the figures I gave him were approximate but that they should not exceed that.

Q. Did you have any discussion relative to delivery schedules?

Mr. Bronson: I did not hear the question.

(Question read by the reporter.)

Mr. E. B. Stanton: Referring to this same conversation.

Mr. Bronson: Now, we will object to that at this time, if your Honor please. This gets into oral matters and details that perhaps they want to tie into a contract pleaded in the manner suggested by Mr. Rowe. We object on the grounds it is incompetent, irrelevant and immaterial, and varying terms of a written contract.

Mr. E. B. Stanton: There has been no variance until the man testifies to the terms of the contract pleaded. [21]

The Court: Very well, overruled.

Mr. Bronson: The court has made a ruling and I feel that we will have to protect ourselves nonetheless, Mr. Stanton.

The Court: Overruled.

Mr. E. B. Stanton: You may answer, Mr. Whipple.

The Witness: Will you repeat the question now?

(Testimony of Harold A. Whipple.)

(Question read by the reporter.)

A. I couldn't say whether we discussed delivery schedule at that conversation or not.

Q. Well, that was the conversation of May the 14th. Did you have any further conversation with Mr. Donnelly or any other member of the Schenley concern?

A. Yes. On the following day I had a phone call from a Mr. Baglin, who introduced himself as Mr. Donnelly's assistant and informed me that——

Mr. Bronson: Now, just a minute. I think you have answered the question.

Q. (By Mr. E. B. Stanton): Incidentally, did Mr. Baglin tell you from where he was telephoning?

A. The operator told me.

Q. And where was that?

A. From San Francisco.

Q. Now will you relate the substance of that conversation of May 15th, that would be, that you had with Mr. Baglin? [22]

Mr. Bronson: We will object again, your Honor, on the grounds stated. And may I suggest to the court, if the testimony of the oral conversation by phone or otherwise between these parties is to be admitted, that we be understood to have a blanket objection?

The Court: That is clear. I am allowing them merely because the letters refer to conversations. Overruled.

(Testimony of Harold A. Whipple.)

Mr. E. B. Stanton: You may answer the question now, Mr. Whipple.

The Witness: What was the question?

(Question read by the reporter.)

A. Mr. Baglin informed me that he was Mr. Donnelly's assistant; he was instructed to carry on in Mr. Donnelly's absence the negotiations with me; that he had been in contact with other departments of the corporation and that they were definitely interested in the purchase of a sizable quantity of glucose. He asked me to repeat for his information the information which I had given previously to Mr. Donnelly. He specifically asked about customs duty, whether that was included in the price and I informed him that it was; and he said that I would hear from him shortly.

Q. Did you hear from him later?

A. On May the 20th I had further phone calls from Mr. Baglin. We discussed the negotiations further.

Mr. E. B. Stanton: One moment, please. Excuse me, Mr. Whipple. Go ahead. [23]

A. He informed me that the Schenley Corporation was prepared to proceed with the purchase of 1,000 tons of glucose and the additional 300 tons which I had previously mentioned as being under option, if it was available, on the basis of information which I had previously given him, and asked me to cable my principals to be certain whether the quantity was still available and the

(Testimony of Harold A. Whipple.)

price still as presented. I asked him if he would confirm the substance of our conversation by letter, and he did.

Mr. E. B. Stanton: I hand counsel what purports to be a copy of a letter of May 20th.

Q. Mr. Whipple, I show you this letter on the stationery of Schenley Distillers Corporation, dated May 20th, and ask if you recognize that?

A. That is correct.

Q. Have you ever seen that before?

A. That is the letter which I received.

Q. Approximately when did you receive that?

A. Probably on May the 21st.

Q. And that is the letter to which you referred when you said that Mr. Baglin would confirm his conversation over the telephone?

A. That is correct.

Mr. E. B. Stanton: I ask that that letter be introduced as Plaintiff's next in order, introduced into evidence. [24]

Mr. Bronson: I would like to ask counsel if he claims that this is part of the contract that you are suing on, rather than Exhibit A which is attached to the complaint?

Mr. E. B. Stanton: I think that counsel is asking me to draw a conclusion which the Judge will draw.

Mr. Bronson: No. I simply asked you that. If you are not answering, I will object, if your Honor please, that it is not the contract they are suing upon.

(Testimony of Harold A. Whipple.)

The Court: Let me see it, please.

Mr. Bronson: Your Honor will remember that Exhibit A is the letter of May 23, 1946. This is the letter of May 20th.

Mr. E. B. Stanton: It is certainly part of the negotiations leading into the contract and confirmation of the witness' testimony. It goes to the intent of the parties to enter into a contract.

Mr. Bronson: Perhaps I can make this suggestion, your Honor, to make the presentation of the Plaintiff's case more orderly and less subject to objection and interruption, that we have our blanket objection to these documents preceding that they set out.

The Court: All right. The objection is overruled.

The Clerk: Plaintiff's Exhibit 2 in evidence.

PLAINTIFF'S EXHIBIT No. 2

"Schenley Distillers Corporation
San Francisco 11, California

May 20, 1946

"Harold A. Whipple Company
316 Commercial Street
Los Angeles 12, California

"Dear Mr. Whipple:

"This will confirm our telephone conversation of today on the subject of Argentine glucose.

(Testimony of Harold A. Whipple.)

“We are interested in purchasing up to 1,000 tons. Shipments to commence May-1946 (if possible at this date)—50 tons; June through September—100 tons a month; October and November—275 tons a month. If your other prospective buyer exercises his option to purchase 300 tons it is understood 50 tons a month from the above will be directed to him, making a shipping schedule to us—June through September—50 tons a month; October and November—225 tons a month, December—300 tons. Further, if your prospective buyer does not take the 300 tons, we would like the opportunity to purchase this quantity in addition to the 1,000 tons.

“It is understood that we will be purchasing by letter of credit direct from the Argentine shipper, cost to us not to exceed 22.3 cents a pound in wood barrels laid down, tax paid, Pacific Coast port. It is further understood the glucose is crystal-clear obtained by incomplete hydrolysis of cornstarch, 43 to 45 Baume, with a balling of 81.8 upwards.

“Just as soon as you receive a reply to your cable to the shipper, which we understand will be by Wednesday of this week, you will phone this office and advise us that the shipping schedule reflected above can be met.

“We will be expecting information from you which will enable us to issue our purchase order and covering letter of credit. Thank you very

(Testimony of Harold A. Whipple.)

kindly for the consideration you have given this matter.

“Yours very truly,

“SCHENLEY DISTILLERS
CORPORATION,

/s/ R. H. GAGLIN.

RHB:SR”

Q. (By Mr. E. B. Stanton): Mr. Whipple, following this telephone conversation of May the 20th did you have any further conversations or contacts with the Schenley Corporation? [25]

A. Yes.

Q. What was that?

A. I had further telephone conversation with Mr. Baglin on May the 21st.

Q. Will you relate the substance of that conversation, please?

A. On May the 21st we discussed further the details of the proposed purchase.

Q. What followed that conversation?

A. I confirmed our conversation by letter.

Q. I show you a letter dated May 21st on the stationery of the Harold A. Whipple Company and ask you if you recognize that letter?

A. Yes; that is the letter which I wrote.

Mr. E. B. Stanton: I will offer this as Plaintiff's next in evidence.

Mr. Bronson: With the understanding, subject to the same objection.

(Testimony of Harold A. Whipple.)

The Court: All right, overruled.

The Clerk: Plaintiff's Exhibit 3 in evidence.

PLAINTIFF'S EXHIBIT No. 3

"Harold A. Whipple Co.

316 Commercial Street

Los Angeles 12, California

"May 21, 1946.

"Schenley Distillers Corp.

900 Battery Street

San Francisco 11, Calif.

Attn. Mr. R. H. Baglin

"Dear Mr. Baglin:

"Confirming our telephone conversation of today regarding Argentine Glucose we quote from cable received today from our principals in Buenos Aires as follows:

'six hundred tons available price 1.375 (pesos per kilo) require twenty-five per cent down payment balance confirmed credit our order delivery hundred fifty tons monthly starting July answer today will endeavor secure balance if you confirm'

/s/ ENGRAW.

after our phone conversation we have replied as follows:

(Testimony of Harold A. Whipple.)

'accept 600 tons one thirty seven one half shipments one hundred fifty monthly will accept balance as available same price Schenley Distillers will open credit entire amount but no cash deposit try ship during June cable confirmation'

/s/ WHIPL.

We will advise you immediately we receive their reply.

"As we stated we do not feel that they are justified in asking for a cash deposit as advance payment on a deal of this sort and would have so cabled them even before discussing it with you. We do not think that this will 'gum up' the deal and have every expectation that they will confirm promptly and—we hope will be able to complete the 1300 tons for delivery in the last $\frac{1}{4}$ of the year. to confirm the figures which we gave you:

"The export exchange rate on Argentine pesos is U\$100.00—335.82 pesos or US \$0.29778 per peso at pesos 1.375 per kilogram—US\$0.4094575 per kg.—\$0.18573 per lb. (1 kg —2.2046 lb)

freight rate is \$25 per 40 cu ft—the barrels contain slightly less than 15 cu ft with a net content of 660 lbs approximately. This will give an equivalent of approximately \$0.0142 per lb. Insurance 1.1/2% .30c per 100 lbs .0030. Duty at 2c per lb .02, giving a landed cost est. 22.293 per lb.

(Testimony of Harold A. Whipple.)

The letter of credit should be opened in favor of
Cia. Engraw Comercial & Industrial, S. A. San
Martin 329 Buenos Aires,

through the First National Bank of Boston
Buenos Aires

by cable covering the full amount in pesos at 1.357
pesos per kilo net FOB Steamer Buenos Aires ex-
piration Oct 30th 1946 or as confirmed.

“We trust that the foregoing is clear to you and
that you can arrange your credit to Cia Engraw
as soon as we advise you that we have their final
confirmation of the sale.

“Confirming our earlier conversation on this sub-
ject Cia Engraw has indicated that they will be in
a position after Jan 1st to furnish from 300 to 500
tons monthly at the then prevailing market for glu-
cose and we would appreciate your informing us if
you would care to book this production for 1947?

“As to quality this glucose is pure corn syrup,
crystal clear, testing 43 to 45 Baume. We anticipate
receiving a small sample by air express in a few
days and will forward it on to you when received.
Further we suggest that documents to accompany
drafts under letter of credit should include a cer-
tificate of analysis as well as a certificate of in-
spection of the cooperage at time of loading, for
insurance purposes.

“Thank you for your cordial cooperation in this
matter and assuring you of our endeavors that this

(Testimony of Harold A. Whipple.)

deal shall work out satisfactorily for all concerned,
we beg to remain

“Yours very truly,

“HAROLD A. WHIPPLE CO.

By /s/ HAROLD A. WHIPPLE.”

Q. (By Mr. E. B. Stanton): Now, Mr. Whipple, do you recall anything further about your conversation of May 21st with Mr. Baglin?

A. Yes. I advised Mr. Baglin at that time that I had received a reply from my principals at Buenos Aires offering [26] 600 tons and asking for an immediate reply. I gave him the details of how the purchase should be consummated, to whom the letter of credit should be issued; and because there were so many details, of course, he asked that I should confirm it in writing, which I did, which you have entered.

Q. Mr. Whipple, what was the next thing that happened with respect to these negotiations following that telephone conversation and your sending of this letter?

A. I had another telephone conversation on May the 23rd.

Q. With whom? A. With Mr. Baglin.

Q. And what was the substance of that conversation?

A. That I had been advised by my principal

(Testimony of Harold A. Whipple.)

that they had 1,135 tons, they had secured 1,135 tons for the Schenley Corporation. I might mention in connection with the May 21st conversation that Mr. Baglin, in accepting the 600 tons, had asked us to secure as much more as possible, therefore, we assumed that the 1,135 tons was—that they would definitely accept if the terms and conditions were the same. However, I confirmed that with Mr. Baglin. He confirmed the acceptance of it.

Q. What did he say?

A. Mr. Stanton, you are asking me what a man said two years ago. [27]

Q. Well, as best you can give it to us.

Mr. Bronson: What conversation is this now, the May 23rd?

Mr. E. B. Stanton: This is the May 23rd.

Mr. Bronson: All right.

A. I can't recall the exact expressions that he used, Mr. Stanton. I can only say that he expressed pleasure at being able to secure the quantity, and said that he would confirm not only the 600 tons I offered him on the previous day but the additional amount and the revised shipping schedule. We discussed the letter which he had written confirming the previous 600 tons. He said that he believed it was already in the mail, but in any event he would confirm the total amount.

Q. Was this conversation followed by any letter?

A. Yes. We received a letter either on the afternoon of the 24th or the morning of the 25th

(Testimony of Harold A. Whipple.)

confirming this conversation, dated May the 23rd, and confirming the purchase of the 1,135 tons as outlined.

Q. Now, Mr. Whipple, do you remember whether or not you wrote to Mr. Baglin again?

A. Yes. On May the 23rd I wrote to Mr. Baglin.

Q. I will show you, first, Mr. Whipple, a letter on the stationery of Harold A. Whipple Company, dated May 23, 1946, and ask you if you can identify that letter? [28]

A. That is correct; that is the letter that I wrote.

Q. To Mr. Baglin?

A. To Mr. Baglin.

Q. And you mailed that to him, did you?

A. I mailed it to him on May the 23rd.

Mr. E. B. Stanton: I ask that that be introduced as plaintiff's next in order of exhibits.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 4 in evidence.

(Testimony of Harold A. Whipple.)

PLAINTIFF'S EXHIBIT No. 4

"Harold A. Whipple Co.
316 Commercial Street
Los Angeles 12, California

May 23, 1946.

"Schenley Distillers Corp.
900 Battery Street
San Francisco, Calif.

"Attn. Mr. Baglin

"Dear Mr. Baglin:

"Confirming our telephone conversation of this morning we quote the cablegrams received from Engraw in Buenos Aires as follows:

NLT Whipl 5-22

"Acting on your cable twentyfirst have completed firm purchases for account Schenley Distillers elevenhundred thirtyfive tons stop your use night letter lost julyaugustdeliveries offered are working on this stop have closed June delivery fifty tons July sixty augustsept Twohundred September onehundredfifty October twoseventyfive November twohundred December twohundred stop as contract is in Argentine pesos assume purchaser is covering forward exchange more details tomorrow'

/s/ ENGRAW.

LC Whipl 5-23

Urgent arrange immediately credit our order to

(Testimony of Harold A. Whipple.)

cover sixhundred tons stop americanbank cable First Boston here so can meet requirement one supply source market today up five cents”

/s/ ENGRAW.

You will understand that they confirm actual purchase for your account of 1135 metric tons of glucose in accordance with shipping schedule given. That they have committed their personal credit to the suppliers pending receipt of your letter of credit and that they require your credit urgently at the earliest possible moment to satisfy one of their sources of supply who demanded a 25% deposit to hold the lot for you.

Will you please ask your NewYork office to cable the credit as quickly as possible instead of air-mailing same? This is particularly important as the next boat starts loading about the 29th and will sail on June 9.

Your credit should call for a total of 1145 Metric tons approx. before December 31st, allowing partial shipments, and your purchase order should show the shipping schedule given “or more.” We have cabled them again tonight asking them to try to improve the June July deliveries.

We await your confirming letter which you stated is in the mail today. Thank you for your cooperation.

Yours sincerely,

HAROLD A. WHIPPLE CO.

/s/ HAROLD A. WHIPPLE.

(Testimony of Harold A. Whipple.)

Q. (By Mr. E. B. Stanton): Now, Mr. Whipple, I show you a letter on the stationery of the Schenley Distillers Corporation, dated May 23rd, addressed to "Harold A. Whipple Company, attention H. A. Whipple," signed by "J. B. Donnelly" for the Schenley Distillers Corporation and ask you if you recognize that letter?

A. Yes, sir.

Q. That is the letter you referred to as receiving on the 24th or 25th?

A. That is the letter which we accepted as a contract.

Mr. E. B. Stanton: I ask that this be introduced into evidence as plaintiff's next in order.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 5 in evidence.

PLAINTIFF'S EXHIBIT No. 5

Schenley Distillers Corporation

850-900 Battery Street

San Francisco 11, California

May 23, 1946.

Harold A. Whipple Co.

316 Commercial Street

Los Angeles 12, California

Attention: Mr. H. A. Whipple

Gentlemen:

This will confirm our telephone conversation and your letter of May 21st.

We hereby acknowledge the offer of Cia. Engraw

(Testimony of Harold A. Whipple.)

Comercial & Industrial S. A., of 600 tons of glucose made from pure corn syrup, crystal clear, and testing between 43 and 45 Baume, at a price of 1.375 pesos per kilogram. The price listed is f.o.b. steamer, Buenos Aires, packaged in wood cooperage containing approximately 660 pounds each. Shipment is to be made via McCormick Steamship Co. to San Francisco or Los Angeles.

A purchase order will be sent to Cia. Engraw Comercial & Industrial S. A. as soon as possible covering this purchase, and a letter of credit will be set up to cover the full amount in pesos. Expiration date will be October 30, 1948, or as confirmed. Shipment of this material is to be at a rate of 150 tons a month.

All correspondence will be handled via air mail instead of regular mail, in order to speed this matter.

Very truly yours,

SCHENLEY DISTILLERS
CORPORATION,

By /s/ J. B. DONNELLY.

JBD:LP

P. S. Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial S. A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept.—200; September—150; October—275; November—200; December—200. The conditions of acceptance of this quantity are the same

(Testimony of Harold A. Whipple.)

as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing.

Mr. E. B. Stanton: I now wish to call attention of the court to a stipulation in the file regarding evidence, which, [29] for the sake of the record, the defendant has stipulated:

“That in case it be determined that the letter dated May 23, 1946, Exhibit ‘A’ attached to the amended complaint, together with the oral and written offers and negotiations precedent thereto, is held to constitute a contract between plaintiff and defendant, then and in that event such contract was within the authority of said J. B. Donnelly to consummate and make for and on behalf of defendant corporation, that no point is or will be made upon the trial of the action herein and that the authority of said J. B. Donnelly to enter into or make such a contract was not in writing, or that he was in any other way not authorized to consummate or make such a contract.”

I ask that that stipulation in the file be introduced into evidence.

The Court: All right.

The Clerk: Shall I give it a number?

The Court: It will be received.

The Clerk: What is the date of that stipulation?

The Court: Mark it as an exhibit.

(Testimony of Harold A. Whipple.)

Mr. E. B. Stanton: That will be somewhere in September of 1947. Our copy here is not dated.

The Clerk: Is it the stipulation on evidence filed September 22, 1947? [30]

Mr. E. B. Stanton: Yes; that is right.

The Clerk: That is marked Plaintiff's Exhibit 6 in evidence.

PLAINTIFF'S EXHIBIT No. 6

In the District Court of the United States, Southern
District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E IN-
DUSTRIAL S. A., a corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION, a
corporation,

Defendant.

STIPULATION ON EVIDENCE

It Is Hereby Stipulated and Agreed, by and between the above-entitled parties, through and by their respective counsel of record, here undersigned, as follows:

I.

That J. B. Donnelly, between the 10th day of May, 1946, and the 7th day of June, 1946, was an executive officer of the defendant corporation.

(Testimony of Harold A. Whipple.)

II.

That between said dates he was invested with full authority by defendant corporation to negotiate and consummate any and all purchases such as that alleged in plaintiff's complaint, and to bind defendant corporation thereto.

III.

That in case it be determined that the letter dated May 23, 1946, Exhibit "A" attached to the amended complaint, together with the oral and written offers and negotiations precedent thereto, is held to constitute a contract between plaintiff and defendant, then and in that event such contract was within the authority of said J. B. Donnelly to consummate and make for and on behalf of defendant corporation, that no point is or will be made upon the trial of the action herein and that the authority of said J. B. Donnelly to enter into or make such a contract was not in writing, or that he was in any other way not authorized to consummate or make such a contract.

IV.

This stipulation is made without prejudice to the maintenance by defendant of the defense that whatever was done or performed by the parties hereto was insufficient to constitute a contract under

(Testimony of Harold A. Whipple.)

the provisions of the applicable statute of frauds, or otherwise.

STANTON & STANTON,
By /s/ LOUIS B. STANTON,
Attorneys for Plaintiff.
BRONSON, BRONSON &
McKINNON,
By /s/ EDGAR H. ROWE,
Attorneys for Defendant.

Q. (By Mr. E. B. Stanton): Now, the last conversation you have related, Mr. Whipple, was the conversation of May 23rd. Did you have any further conversation?

A. Yes. On May the 24th I talked——

Q. Who was that conversation with?

A. I talked again with Mr. Baglin specifically with regard to the issuance of the letter of credit.

Q. What was the substance of that conversation if you recall?

A. That it was reported to my principals that the letter of credit be issued as speedily as possible; that the amount involved was a very large amount and they needed the letter of credit at the earliest possible moment. Mr. Baglin assured me that the necessary information had already been forwarded to their eastern office for processing; that the letter of credit was being processed there as rapidly as possible, but it was doubtful they could issue the letter of credit before Monday, May the 27th.

(Testimony of Harold A. Whipple.)

Q. Did you have any further telephone conversations on that day with Mr. Baglin or with anyone else?

A. It is possible that I had another conversation either later on May the 24th or the morning of May the 25th [31] with Mr. Baglin at which we discussed a further offer of glucose from my principals which could be obtained at an increased price. However, giving them additional quantities for delivery during July, August, and September, in which they were greatly interested. Mr. Baglin——

Q. Now, Mr. Whipple, did you have any correspondence with your principals or did you receive any correspondence from your principals confirming this 1,135 tons? A. Yes.

Q. About when?

A. I received a cable. I cabled them confirming the purchase by Schenley Distillers and forwarded a confirmation of the cable on the same day.

Q. Mr. Whipple, I show you this cable dated May 23rd, 1946, and ask if you recognize that, the wording therein?

The Court: Before you proceed I want to identify the stipulations which have been marked as Plaintiff's Exhibit 6. It is in the file and it was filed on September 22, 1947. It does not bear the date of execution, but that is the date on which it was filed.

A. This is a cable which I received on May the 23rd from Buenos Aires, signed by Engraw.

(Testimony of Harold A. Whipple.)

Mr. E. B. Stanton: I ask that this be introduced as plaintiff's next exhibit in order.

The Court: All right. [32]

The Clerk: Plaintiff's Exhibit 7 in evidence.

PLAINTIFF'S EXHIBIT 7

Western Union Telegram

1946 May 23 AM 2:59

NB114 Intl CD Baires Via Allamerica 70/69 1/50 22
NLT Whipl

Losa

(Harold A. Whipple Co.)

(316 Commercial St., Room 208)

Acting on your cable twentyfirst have completed firm purchases for account Shenley Distillers elevenhundred thirtyfive tons stop Your use night letter lost July August deliveries offered are working on this stop Have closed June delivery fifty tons July sixty AugustSept two hundred September onehundredfifty October twoseventyfive November twohundred December twohundred stop As contract is in Argentine pesos assume purchase is covering forward exchange more details tomorrow.

ENGRAW.

Q. (By Mr. E. B. Stanton): Following the 24th or 25th that you have mentioned your conversations

(Testimony of Harold A. Whipple.)

with Mr. Baglin, did you have any further contact or communication with the Schenley Corporation concerning glucose? A. Yes.

Q. Now, about when?

A. On May the 28th I talked by telephone again with Mr. Baglin.

Q. And what was that conversation if you recall?

A. We again discussed the letter of credit. I had had information that my principals had not yet received advice of the credit. I asked Mr. Baglin if he knew whether the credit had been issued and if he could give me the name of the bank who issued the credit and the credit number. He informed me that he was certain that the credit had been issued the previous day or was being issued that day; that they would either use the Chase National Bank or the Bankers Trust Company in New York; that he would ask New York definitely for the bank and the credit number and advise me by telephone.

Q. Anything further in that conversation?

A. Yes. We also discussed, either in that conversation or one an hour or so later—I think we had two on that day—we also discussed an additional offering of [33] 200 to 400 tons of glucose of which I had received cable offer from my principals.

Q. Now, one moment, Mr. Whipple.

A. The terms and conditions being the same, he accepted.

(Testimony of Harold A. Whipple.)

Q. He accepted what?

A. He accepted the offer.

Q. Mr. Whipple, I show you a cable addressed to Whipple, signed "Engraw," bearing stamp date May 28th and ask you if you will identify that?

A. Yes; that is the cable which I received.

Q. That is the cable which you referred to?

A. Which I referred to as the offer.

Q. In your conversation with Mr. Baglin?

A. Yes, sir.

Mr. E. B. Stanton: I ask that this be introduced as plaintiff's next exhibit.

Mr. Bronson: May we inquire the purpose before it is ordered admitted and marked?

Mr. E. B. Stanton: Yes, Mr. Bronson. When we will show the supplier's contracts on this matter of supplier's contracts, they will total, as was given in the opening statement, a matter of 1,535 tons rather than 1,135 tons.

Secondly, in the matter of disposal of the glucose, it will show disposal of 1,535 tons rather than 1,135 tons. [34] And while we wish to show this is part of the same transaction, but we are making no claim to the 400 tons.

Mr. Bronson: It is merely explanatory, in other words, of some evidence that you are bringing out later?

Mr. E. B. Stanton: That is right.

Mr. Bronson: We will withhold any objection now to the offer in view of the statement of counsel.

(Testimony of Harold A. Whipple.)

The Court: All right.

The Clerk: Admitted?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 8 in evidence.

PLAINTIFF'S EXHIBIT 8

Western Union Telegram

JB 306P 1946 May 28 PM 2:46

DU453 Intl CD Baires Via Allamerica 20/19 28
431P

LC Whipl

(Harold A. Whipple Co., 316 Commercial St)

(Room 208)

Losa

Firm offer till twentyninth twohundredtons one-
thirty fifty monthly July October possibility double
quantity same price.

ENGRAW.

Q. (By Mr. E. B. Stanton): Following this con-
versation with Mr. Baglin did you have any cor-
respondence with Engraw concerning the offer?

A. Yes.

Q. What was that and what did you do?

Mr. Bronson: Will you fix the time of it if you
can, please?

Q. (By Mr. E. B. Stanton): I am referring to
the conversation of May 28th to which you have just

(Testimony of Harold A. Whipple.)

testified. At or about that time what did you do, if anything?

A. I cabled Engraw.

Q. Do you remember about when?

A. The same date.

Q. I show you what purports to be a cable on the Western [35] Telegraph Company, Ltd. with a receipt date of May 29th, addressed to Engraw and signed "Whipple," and ask you if you recognize the wording in that wire?

A. That is correct. That is the night letter which I sent out on the 28th.

Mr. E. B. Stanton: I ask that this be introduced as plaintiff's next exhibit in order.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 9 in evidence.

PLAINTIFF'S EXHIBIT 9

The Western Telegraph Company Limited

Telegrama No. 00158

Whl211 LosAngeles Calif 44 28

NLT Engraw Baires

Accept two hundred four hundred tons offered requires one week clear credit confirm stop Subject successful conclusion present negotiations Schenley prepared negotiate 1947 production ieixed price basis stop Can arrange two weeks extension trucks if you advise confidence successful conclusion.

WHIPL.

(Testimony of Harold A. Whipple.)

Q. (By Mr. E. B. Stanton): Now, following that cable did you receive any word from Engraw?

A. Yes. I had a series of——

Q. I am referring to this 400-ton matter.

A. Yes. I received a cable on the following day, I believe.

Q. I show you a cable on the Western Union Cable stationery, dated May 29th, Whipple to Engraw, and ask you if you recognize that?

A. Yes, sir; that is the cable I received.

Mr. E. B. Stanton: I ask that this be introduced as plaintiff's next exhibit in evidence.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 10 in evidence.

PLAINTIFF'S EXHIBIT 10

Western Union

WB 9:56 AM

1946 May 29 AM 9:37

CDU230 Intl CD Baires Via Allamerica 20 29 12
18P

LC Whipl

Losa

(Harold A. Whipple Co.)

(316 Commercial St.)

(Rm. 208)

Acting your twentyeight completed purchases
fourhundred onehundred monthly July October ar-
range credit stop Trucks pending decision.

ENGRAW.

(Testimony of Harold A. Whipple.)

Q. (By Mr. E. B. Stanton): Up to this time in these conversations that you have testified to was there any discussion [36] concerning the matter of samples; that is, when I say "up to this time" I am referring up to—I will limit that—say, the 25th of May?

A. The question of sample may have been discussed incidentally; however, not as any condition of the execution of the contract.

Mr. Bronson: I submit that was a conclusion, if your Honor please.

The Court: Yes; that may have been. Strike that.

Q. (By Mr. E. B. Stanton): You do not recall specifically then, anything that you could tell us about now? A. No, sir.

Q. Following the 25th of May did you have any conversations concerning samples? A. Yes.

Q. With whom?

A. With Mr. Baglin.

Q. About when?

A. About May the 28th or 29th.

Q. Can you relate the conversation as best you can recall?

A. Mr. Baglin said that his Cincinnati office was very anxious to obtain a sample. I explained to him that we had no sample in hand; we had had a sample previously which had been submitted to other clients and we had a [37] letter from Engraw stating that a sample was being forwarded; we

(Testimony of Harold A. Whipple.)

would be glad to furnish that sample as soon as it was received or, if we were able to obtain return of the sample we had from our previous clients. I also explained to him that glucose was standard merchandise, was regularly sold on laboratory analysis, and that we would expect to furnish a laboratory analysis showing that the glucose conformed to the specifications set forth in the contract.

Q. (By Mr. E. B. Stanton): Was there any further conversation or did you do anything with reference to a sample of any kind?

A. I had conversations with Mr. Baglin on June 3rd, the 4th and 5th.

Q. And what were these conversations, if you recall, can you give them specifically?

A. I cannot give you specifically the details of each conversation. I know that they definitely were concerned seriously with the failure of Schenley to furnish the letter of credit; and on June 5th, I advised Mr. Baglin that I had received the sample from one of my clients in the United States and he gave me instructions, either at that time or the day previously, where to forward that sample.

Q. And what did he tell you in that regard?

A. He told me to forward that immediately to Many Blanc Company in Chicago.

Q. Did you do so?

A. I did so. On June 5th, I accompanied it by registered air mail, return receipt requested; I accompanied it by a letter of transmittal. I sent a copy of the letter of transmittal to Mr. Baglin.

(Testimony of Harold A. Whipple.)

Mr. E. B. Stanton: Do you have those?

The Court: While we are waiting, let us take a short recess, gentlemen. [39]

(Whereupon a short recess was taken.)

Mr. E. B. Stanton: Will the reporter read the last question and answer?

(Record read by reporter.)

Q. Mr. Whipple, I show you what purports to be in partially copy and partially in original, letter dated June 5th on the stationery of Harold A. Whipple, bearing a signature at the bottom. Can you identify this particular document I am showing you?

A. Yes. This was a copy of the letter to Many Blanc and at the bottom is a footnote, which I added on the copy to Mr. Baglin.

Q. Then, what would this have been, this particular letter?

A. This was a copy of the letter of transmittal to the Many Blanc Company, the original of course having gone to Many Blanc.

Q. And is this the copy which you sent?

A. This is the copy which I sent to Mr. Baglin.

Mr. E. B. Stanton: I ask that this be introduced in evidence as Plaintiff's exhibit next in order.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 11 in evidence.

(Testimony of Harold A. Whipple.)

PLAINTIFF'S EXHIBIT 11

(Stamped June 6, 1945)

(Letterhead Harold A. Whipple Co.)

June 6, 1945

Many Blanc & Co. Inc.

3414 West 48th Place

Chicago 32

Ill.

attn Mr. Bayles

Dear Sir:

in accordance with request received from Mr. Baglin, Schenley Distillers Corp. San Francisco, we are sending you via airmail, registered, a small sample of Argentine Glucose which has been submitted by our principal in the Argentine as a representative sample of the glucose which they will ship to Schenley Distillers.

We trust that you will expedite the examination of this sample and render your report without delay.

Yours very truly,

HAROLD A. WHIPPLE CO.

By /s/ HAROLD A. WHIPPLE.

HAW/H

copy to Schenley San Francisco

2 copies to Engraw

Mr. Baglin:

the above sample is the one mentioned in our conversation as received earlier from Engraw and

(Testimony of Harold A. Whipple.)

which has just been returned to us by our client in the northwest. It just came in a few moments ago, and we hasten to forward it on to Chicago. In the meantime we are looking forward to receiving from you confirmation of specifications which will meet the approval of your Cincinnati office as understood in our phone conversation of this morning.

HAROLD A. WHIPPLE CO.
HAROLD A. WHIPPLE.

Mr. E. B. Stanton: Now, for the record, I have asked the defendant to produce, pursuant to notice, the original [40] letter to Many Blanc Company. Counsel have informed me that they are not in possession of the original letter, however, that they are willing at this time to stipulate that the original letter, which is shown by the carbon copy on this Plaintiff's Exhibit 11, was actually received by the Many Blanc Company; is that correct?

Mr. Bronson: Well, that is the information that we don't have. But we will not offer any objection to your offering the entire exhibit and I understand that you have there a return receipt on registered mail, a registered letter to Many Blanc.

Mr. E. B. Stanton: Our stipulation, I understood, called for a bit more than that. I wished to have a stipulation that Many Blanc actually received the letter.

(Testimony of Harold A. Whipple.)

Mr. Bronson: Well, I can't do that. We have never found—or we haven't been supplied, I better put it, with any letter received by Many Blanc, but we have been supplied with the document that you have just handed to the witness.

Mr. E. B. Stanton: I see. That was given to you, then, by the Schenley Distillers Corporation.

Mr. Bronson: Well, it was given to us by the party to whom the postscript is addressed, Mr. Baglin. It came from his file. We haven't any record of Many Blanc receiving the original.

Mr. E. B. Stanton: Now, Mr. Whipple, I show you what [41] purports to be a return receipt card on the stationery of the Post Office Department, which bears a mailing date, addressed to you, of June 8, 1946, and ask you if you can identify that.

A. This is a return receipt signed by Many Blanc & Company and dated June 6th.

Q. That is the date of receipt?

A. That is the date of receipt by Many Blanc & Company. This was attached to the registered package containing the sample of glucose.

Q. I believe you testified, wasn't it a fact, that you had requested a return receipt.

A. That is correct.

Mr. E. B. Stanton: I ask that this be offered in evidence as Plaintiff's exhibit next in order.

The Court: All right, it may be received.

The Clerk: That is Plaintiff's Exhibit 12 in evidence.

(Testimony of Harold A. Whipple.)

PLAINTIFF'S EXHIBIT 12

Post Office Department

Official Business

(Stamped) Chicago, Ill.

Jun 8 1946 10 AM

Return to Harold A. Whipple Co.

316 Commercial St.

Los Angeles 12,

California

Registered Article No. 98333

Insured Parcel

(On reverse side of card)

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1 Many Blanc & Co.

2 R. Dishler

(Dated of Delivery 6-6-1946

Mr. Bronson: Before we go any further on that matter, did the witness testify that the signature on there is the signature of Many Blanc? Do I understand you correctly to say—or rather, that it says Many Blanc there?

A. It says Many Blanc & Company, sir.

Mr. Bronson: All right.

The Court: All right. Go ahead.

Q. (By Mr. E. B. Stanton): Now, following the sending of that Many Blanc letter, a carbon of

(Testimony of Harold A. Whipple.)

which you sent to Mr. [42] Baglin as you have testified you mailed on or about June 5th, did you have any further contact with anyone contacted with the Schenley organization?

A. Yes. On June 6th I received a telephone call from a gentleman who introduced himself as Mr. Woolsey of Schenley Distillers Corporation.

Q. Did Mr. Woolsey tell you what position, if any, he held in the Schenley Distillers Corporation?

A. I don't recall that he did, Mr. Stanton, in the conversation.

Q. What was the substance of that conversation, that you recall?

A. He informed me that in connection with the negotiations for glucose, that his company did not intend to fulfil their contract. I objected, that I had Mr. Donnelly's firm contract in hand; that my principals had already covered the necessary purchases and that they just couldn't do that.

He informed me that Mr. Donnelly was not a responsible officer of the Schenley Corporation. In that case I asked him to have a letter signed by a responsible officer of the Schenley Corporation, addressed to me, setting forth what he intended to do and his reasons for doing so.

Q. Now, did you receive such a confirmation of that conversation?

A. The only confirmation which I received was a [43] telegram on the following day, June 7th.

Mr. E. B. Stanton: Now, one moment.

(Mr. Stanton hands document to Mr. Rowe.)

(Testimony of Harold A. Whipple.)

Q. I show you a telegram dated June 7, 1946, Western Union, Harold A. Whipple Company, signed Schenley Distillers Corporation by James E. Woolsey, Assistant Secretary, and ask you if you recognize that wire.

A. That is the wire which I received.

Mr. E. B. Stanton: I ask that this be introduced as Plaintiff's exhibit next in order, in evidence.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 13 in evidence.

PLAINTIFF'S EXHIBIT 13

Western Union

TD07

T. FC 304 DL PD: SanFrancisco Calif 7 1135A

Harold A. Whipple Co.

316 Commercial St.

Losa

Following our telephone conversation of yesterday, and in response to your request that said conversation be confirmed in writing. We advise that we are not entering into any agreement with CIA Engraw Commercial and Industrial SA for the purchase of lucose.

SCHENLEY DISTILLERS
CORPN.,

By JAS. E. WOOLSEY,
Assistant Secretary.

CIA SA

(Testimony of Harold A. Whipple.)

Mr. Bronson: What was the date of that?

Mr. E. B. Stanton: June 7th.

Q. Mr. Whipple, did you communicate the contents of this wire to your principals?

A. I did.

Q. When.

A. On or about the same date.

Q. I show you an original telegram, Western Telegraph Company, Limited, addressed to Engraw, Buenos Aires, signed Whipple, showing a receipt date June 7th in Buenos Aires, and ask you if you recognize the contents of this wire?

A. That is correct. That is a wire I sent, following telephone conversation with Mr. Woolsey.

Q. That would be on June 6th?

A. On June 6th.

Mr. E. B. Stanton: I ask that this be introduced as Plaintiff's Exhibit next in order, in evidence.

The Court: All right, it may be received.

The Clerk: Plaintiff's Exhibit 14 in evidence.

PLAINTIFF'S EXHIBIT 14

The Western Telegraph Company Limited
WLH148 LosAngeles Cal 47 6
NLT Engraw Baires

Schenley legal department SanFrancisco phones
advise Cincinnati refuses complete contract claim-
ing no contract because formal purchase order and
credit not issued stop Effectively repudiates signa-

(Testimony of Harold A. Whipple.)

ture their San Francisco employee stop We requested responsible official put cancellation in writing stating reasons doubtful they will comply.

WHIPL.

Q. (By Mr. E. B. Stanton): At or about this time, Mr. Whipple, did you have any further or other communication with your principal, Engraw?

A. Yes. I followed the cable with a letter setting forth all of the details of the transaction up to that time.

(Mr. E. B. Stanton hands documents to defendant's counsel.)

Mr. E. B. Stanton: You may have a copy, Mr. Rowe.

Q. Mr. Whipple, I show you now what purports to be your original letter, on the stationery of Harold A. Whipple Company, bearing the date of June 6, 1946, signed Harold A. Whipple. I call your attention to that signature. Is that your signature?

A. Yes, sir.

Q. Now, is that the letter to which you referred when you said that you had sent confirmation to Engraw?

A. That is correct. [45]

Q. Now, I call your attention to the first paragraph, reading—

Mr. Bronson: Wait a moment. You have not offered it in evidence yet.

Mr. E. B. Stanton: I will offer this letter—

(Testimony of Harold A. Whipple.)

Mr. Bronson: We will object to it on the ground it has nothing to do with the matter.

Mr. E. B. Stanton: I offer this letter into evidence as plaintiff's next exhibit.

Mr. Bronson: We will object to it, if your Honor please, on the ground it has nothing to do with the matter under dispute. It is a vituperative sort of characterization containing the witness' signatory.

Mr. E. B. Stanton: I might mention to the court that the primary purpose of this letter is to connect up by showing the—the letter itself states that the contract, or what we take the position is a contract, was sent to the principals, and shows this letter is——

Mr. Bronson: We will stipulate that you sent the original down there. That is little excuse for putting that kind of thing in evidence.

Mr. E. B. Stanton: Will you also stipulate, then, that the knowledge of the refusal to complete the contract was similarly transmitted to Engraw?

Mr. Bronson: We can't enter into a stipulation that [46] has anything to do with a contract.

Mr. E. B. Stanton: Then I have to insist upon my letter showing transmittal of the information, Mr. Bronson.

Mr. Bronson: The information is different from calling it a contract.

Mr. E. B. Stanton: Will you stipulate, Mr. Bronson, that a copy of the letter of May 23rd,

(Testimony of Harold A. Whipple.)

signed by Mr. Donnelly, was hereby sent to Mr. Berger?

Mr. Bronson: I don't know anything about that.

Mr. E. B. Stanton: Then I maintain the letter is evidenciary for that purpose.

Mr. Bronson: I suggest, counsel, that that is rather a dim ground for putting in this kind of argument between——

The Court: I think, gentlemen, in view of the stipulation which I have just read again, which admits authority on the part of Donnelly to consummate a deal, this letter, which is rather strong in its language in characterizing the defendant, would be, at most, proof that they received the contract, and is not material because, if they stipulate, as they have under this stipulation, that Donnelly has authority to bind them, the only question that remains so far as the contract is concerned is the proof of its terms.

I will sustain the objection to this. You may have it marked for identification if you so desire.

Mr. E. B. Stanton: Thank you, your Honor. We desire to have that so marked. [47]

The Court: Do you want it so marked?

Mr. E. B. Stanton: Please.

The Court: It may be marked for identification only.

The Clerk: Plaintiff's Exhibit 15 marked for identification only.

(Testimony of Harold A. Whipple.)

PLAINTIFF'S EXHIBIT NO. 15

(Letterhead Harold A. Whipple Co.)

June 4, 1946

Cia Engraw
San Martin 329
Buenos Aires
Argentine

attn Mr. Berger

Dear Mr. Berger:

Enclosed are final telegram confirmations on the Schenley double x. also, copy of letter of commitment for the purchase dated May 23rd from Mr. Donnelly of their Sanfrancisco office—and letter of transmittal of the sample which we were able to recover from a former prospect and forwarded to Many Blanc at Baglins request (Baglin is asstant to Donnelly).

The refusal to complete the deal came over the phone this noon in reply to my demand yesterday to Baglin that Cincinnati furnish us with specifications on which they would go through with the purchase without waiting for the arrival of the samples.

In effect I told Baglin over the phone that the manner in which they were "horsing around" aout issuing their purchase order or furnishing specifications on which they expected to judge the glucose "smelled to high heaven of a stall until they could find a way to wiggle out of the deal if they

(Testimony of Harold A. Whipple.)

wanted to do so." He promised that he would have Cincinnati furnish a statement that they would go through with the deal if samples met such specifications as Cincinnati would furnish—today. Instead Cincinnati wired or phoned their legal department in Frisco to get them to wiggle clear of the deal. As you can see most of the exchanges on this matter have taken place over the phone and we have in writing nothing from Cincinnati—only the enclosed letter from Donnelly San Francisco. Donnelly however is a department manager or something of the sort—but as their attorney pointed out not "an official of the Corporation."

It seems obvious that upon learning that they could actually secure large quantities in B.A. they got busy with direct connections of sorts while giving us the "stall," and now probably have some sort of commitment that suits them better. They are widely reputed up here for sharp practices, as you perhaps know, and they maintain a large legal staff to keep them out of jail."

I am turning the record over to L. B. Stanton tomorrow for an opinion—and fatherly advise. But see little prospect in any litigation. Will keep you informed of anything further that develops. Also am trying to place the glucose elsewhere.

Sincerely,

HAROLD A. WHIPPLE & CO.,
/s/ HAROLD A. WHIPPLE.

(Testimony of Harold A. Whipple.)

Mr. E. B. Stanton: That is all with this witness, your Honor. Now, if you care to give an adjournment at this time——

The Court: Wait a minute. That is what I was going to talk to you about. You know, I never look at the clock. I was going to tell you about a matter and it may well be that you will want to go on and finish with this witness.

Gentlemen, this is the situation that has confronted me lately, that is, that I have had a very long succession of trials just following one after another, and in order to be able to do so I have had to keep very unorthodox hours, and in order to clear my calendar for this week I kept some very long hours to complete the case which preceded it.

The rush is over now and I have nothing further for the balance of the week because, as I told you, I promised you a clear date and I gave it to you when I took this case over. However, this situation has arisen: Because of the holidays, the usual meeting which we hold on the first Monday of every month was set for this afternoon at 3:00 o'clock. I mean the usual meeting of judges begins at [48] 3:00 o'clock. It is very important that I attend it for several reasons. An added reason is that, as I informed you, I am to sit in San Francisco next month and I have just received a letter from Judge Garrecht about the assignment which will probably make it impossible for me to attend the meeting next month, which means it will be the last month

(Testimony of Harold A. Whipple.)

before vacation when we can have a meeting of the judges, where we usually discuss various matters. Sometimes I take a chance and rely on the possibility of leaving early, but when I did that last month in order not to break the continuity of the case I was on, I kept counsel here waiting for an hour and a half before I returned.

So I was going to suggest this to you: In view of the fact that we do have ample time and I am willing to work long hours in order to complete the case, and I figure if you do not complete it, you have prepared and you can go on next week and I will trail the other cases, it may well be that instead of running a chance of not having more than an hour, you can go on now and complete with this witness and take an adjournment until tomorrow morning.

I am just leaving that up to you. You know best whether the case will take the entire week or not. You, yourselves, probably were affected the same way by the holidays. And we also have the fact that it is also a holiday so far as the State courts are concerned. Everything is closed except the Federal departments, because it is not a [49] holiday as far as we are concerned, being an election day.

So I thought I would make the statement to you. If you want to, I will go on until 1:00 o'clock or complete with this witness and take an adjournment until tomorrow morning. I am sure we can make up the lost time. If you want to take an adjourn-

(Testimony of Harold A. Whipple.)

ment and go over until 2:00 o'clock this afternoon, I can do it, too. I will just leave it with you.

Mr. Bronson: It would be our turn to go ahead now with the examination of Mr. Whipple.

The Court: Yes.

Mr. Bronson: And I was going to suggest to your Honor that I think we can make more time if we have a little time now to go over his testimony, get our exhibits in shape and come back, than if we proceed now. In view of that I would like to make either one of two suggestions, alternative, to your Honor for the approval of counsel: That we either come back at 2:00 o'clock or adjourn until tomorrow morning. But I do think that I would like personally, and it would be an advantage to the court, in our having the time now to go over this testimony and get our exhibits in shape for the cross-examination of this witness.

The Court: What do you gentlemen say?

Mr. E. B. Stanton: I think, your Honor, we would prefer, if possible, to come back at 2:00 and run until 3:00 o'clock [50] if it is agreeable to the court.

The Court: If that is preferable, all right, if you want to do that.

Mr. Bronson: I was going to suggest, if your Honor has the balance of the week clear, I am confident we can complete the case this week.

Mr. E. B. Stanton: I feel that we will.

Mr. Bronson: Even if we adjourned until tomorrow morning at this time.

(Testimony of Harold A. Whipple.)

(Counsel conferring privately.)

The Court: Gentlemen, so long as you gentlemen cannot agree on it, we will make it 2:00 o'clock. By that time I will inquire of Judge McCormick to see what matters are up so as to see if my presence for any length of time is necessary. We will have that hour, anyway, and can complete with this witness. I have read these exhibits as we were going along. They are not very lengthy.

All right, gentlemen, 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 o'clock of the same day, Tuesday, June 1st, 1948.) [51]

Tuesday, June 1st, 1948, 2:00 p.m.

Mr. Bronson: Will you resume the stand, please?

HAROLD A. WHIPPLE

(Recalled)

Cross-Examination

By Mr. Bronson:

Q. Mr. Whipple, with reference to the second exhibit that was placed in evidence, a letter from Mr. Baglin to you on May 20th, 1946, you sent a wire upon receipt of that letter to Engraw, did you not?

A. Would you read the letter or let me read the letter?

(Testimony of Harold A. Whipple.)

Q. Yes, I have a copy here, handed to me by your counsel.

Would you produce, Mr. Stanton, a wire—cable, rather, sent by Mr. Whipple to Engraw on May 20th?

A. Yes; I sent a letter to Engraw.

Q. Was it sent the same date as that letter shows?

A. I would like to see the wire that Mr. Stanton is looking for.

Mr. E. B. Stanton: I do not have an original of the wire—oh, it is Whipple to Engraw. Excuse me.

Q. (By Mr. Bronson): While we are waiting for that and if it is not an interference with the counsel's search, when did you get that letter that you have there now that [52] is marked Exhibit 2 here?

A. This letter of May 20th?

Q. Yes.

A. I have no way of telling, Mr. Bronson, but I believe on the 21st.

Mr. Bronson: For the assistance of counsel, it is a wire that starts "Confirming Sale 1,300 Tons Glucose."

Mr. E. B. Stanton: I have this.

Q. (By Mr. Bronson): Your counsel has handed me a copy of a telegram addressed to "Engraw" and signed "Whipl." Was that cable sent by you to Engraw?

A. That is correct.

Q. And the date that the copy bears in the upper right-hand corner "May 20 2 42 PM" is ap-

(Testimony of Harold A. Whipple.)

proximately the day and hour that it was sent, is that true?

A. I assume that is the date which it was received, Mr. Bronson, because this is a copy on the All America, which would be a copy taken in Buenos Aires.

Mr. Bronson: Have you the original of that cable, Mr. Stanton? You supplied us with a photostatic copy of it and it shows it was sent on the 20th. Do you have the original?

Mr. E. B. Stanton: I haven't got the original.

The Witness: That would be quite probable.

Mr. Bronson: Will it be stipulated that the telegram [53] was sent on the 20th? That is the cipher for it there on all cables, I am sure you are familiar, and your copy shows.

Mr. E. B. Stanton: This bears the 20th. That means it was sent on the 20th.

Mr. Bronson: Your copy here shows Los Angeles date May 20th, isn't that right?

Mr. E. B. Stanton: That is what it shows.

Mr. Bronson: Can we stipulate that the cable was sent on the 20th of May as your stamped copy shows?

The Witness: That would be correct.

Mr. Bronson: We will offer that into evidence, if your Honor please, in lieu of the original, a copy supplied by counsel.

The Court: All right.

The Clerk: It will be Defendant's Exhibit A in evidence.

(Testimony of Harold A. Whipple.)

DEFENDANT'S EXHIBIT A

All America Cables and Radio, Inc.

May 20 2 42 PM

ESA.

BSXZ29 Los Angeles Calif 28 20 9.58 NG

Engraw Buenos Aires

Confirming sale 1300 tons glucose accordance offer
April April 24 May 9 cable earliest shipping San
Francisco whose name credit can you increase ear-
lier shipments

WHIPL

Q. (By Mr. Bronson): Talking of that exhibit
for a minute, Mr. Whipple, the wire reads:

“Confirming sale 1300 tons glucose accordance
offer April April 24 May 9 cable earliest shipping
San Francisco whose name credit can you increase
earlier shipments

Whipl”

The sale that you confirm by this cablegram was
to whom? [54]

A. That would be confirming the sale to Schen-
ley on Mr. Baglin's verbal commitment.

Q. When did you receive the verbal commitment
from Mr. Baglin?

A. At sometime during the day of May the 20th.

Q. And did you ask him to write a letter?

A. I did.

(Testimony of Harold A. Whipple.)

Q. In line with what he had said on the phone?

A. I did.

Q. I will bring this up here if you require it, but I am calling your attention to what the letter shows: "We are interested in purchasing up to a thousand tons." Then it specifies shipping dates and speaks of another 300 tons as follows: "Further, if your prospective buyer does not take the 300 tons, we would like the opportunity to purchase this quantity in addition to the thousand tons."

A. Which would make a total of 1,300 tons.

Q. Yes. But what Mr. Baglin told you on the phone, Mr. Whipple, was that he was interested in purchasing glucose, is that not true?

A. What Mr. Baglin told me on the phone is not necessarily stated in his letter.

Q. What he said in the letter was that he was interested, and wasn't that what you asked him to reproduce of the conversation? [55]

A. No. My recollection of the conversation was that I asked him to make it in the form of a firm offer to purchase.

Q. And you got a statement that he was interested in buying glucose to that amount?

A. That is correct.

Q. Now, further with respect to the letter you got from Mr. Baglin, he stated there: "Just as soon as you receive a reply to your cable to the shipper, which we understand will be by Wednesday of this

(Testimony of Harold A. Whipple.)

week, you will phone this office and advise us that the shipping schedule reflected by that can be made. We will be expecting information from you which will enable us to issue purchase order and covering letter of credit." You recall that in Mr. Baglin's letter?

A. I do.

Q. Did you supply him with a shipping schedule thereafter?

A. Yes, sir.

Q. On what document was that?

A. I supplied him by telephone and it was confirmed by letter, by letter to him of May the 21st, I believe, which is in evidence.

Q. At the date that you sent the cable that is our first exhibit confirming sale of 1,300 tons, you had no sale at that time; that is true, isn't it, Mr. Whipple? [56]

A. I had a commitment to purchase.

Q. You had a statement that they were interested in Glucose and that is all, is it not?

A. I did not have the written letter in my hand at that time, Mr. Bronson. I only had Mr. Baglin's statement on the telephone.

Mr. Bronson: May I have wire from Engraw to Mr. Whipple dated May 21st? Any objection to it going into evidence? And your reply——

Mr. E. B. Stanton: I said no.

Mr. Bronson: I beg pardon.

Mr. E. B. Stanton: I said no.

Mr. Bronson: I am sorry, I did not catch your answer.

(Testimony of Harold A. Whipple.)

We will offer this wire that counsel just agreed may go in and I will read it to the court.

The Clerk: Defendant's Exhibit B in evidence.

The Court: You do not need to read these. I can read them.

Mr. Bronson: Very well, your Honor.

The Court: Under my custom they are transcribed, anyway.

Mr. Bronson: Very well.

DEFENDANT'S EXHIBIT B

is in the following words and figures, to wit:

"CDU234 Intl-CD Baires via Allamerica 40/37
21 1202P

"LC Whipl ([57]

"Losa

"Subject prior sale sixhundred tons available price onethirty require twentyfivepercent downpayment balance confirmed credit our order delivery hundredfifty tons monthly starting July answer today will endeavor secure balance if you confirm new price.

ENGRAW."

Mr. Bronson: I have another cable I would like you to produce if you will.

I have a cable here handed me by your counsel,

(Testimony of Harold A. Whipple.)

a night letter, dated the 21st and showing its receipt in Buenos Aires on the day following, May 22nd, directed to Engraw and signed "Whipple." Did you send such a cable on that day?

A. That is correct. May I see that again, Mr. Bronson?

Mr. Bronson: Yes, indeed. I will ask that that be admitted and marked, your Honor.

The Court: It will be received.

The Clerk: Defendant's Exhibit C in evidence.

DEFENDANT'S EXHIBIT C

is in the following words and figures, to wit:

"WL H223 Hollywood Calif 38 21

NLT Engraw Baires

Accept 600 tons one thirty shipments one hundred fifty monthly will accept balance as available same price Schenley Distillers will open credit entire amount but no cash deposit try ship during June cable confirmation.

WHIPL."

Mr. Bronson: Have you the original of that?

Mr. Bronson: Have you any objection to this wire, signed by Engraw and dated May 23rd, received May 23rd and directed to Mr. Whipple?

Mr. E. B. Stanton: No.

(Testimony of Harold A. Whipple.)

Mr. Bronson: We will ask that the wire, starting "Urgent. Arrange Immediately Credit," be admitted as our next exhibit.

The Clerk: Is this admitted, your Honor?

The Court: Yes.

The Clerk: Defendant's Exhibit D in evidence.

DEFENDANT'S EXHIBIT D

Western Union Telegram

CDV3 Intl-CD Baires Via Allamerica 32/30 23
1025 A

Harold A. Whipple Co.

316 Commercial St Rm 208

Losa

Urgent arrange immediately credit our order to cover sixhundredtons stop Ask American Bank cable First Boston here so can meet requirement one supply source market today up fivecents.

ENGRAW.

Mr. Bronson: Will there be objection to the wire signed "Engraw," dated the 23rd of May, night letter?

Mr. L. B. Stanton: No.

Mr. Bronson: ———received May 24th. I will ask that the wire from Engraw to Whipple, starting with "Eleven Hundred Thirty-five Tons Total

(Testimony of Harold A. Whipple.)

Available at one Thirty. Stop." be admitted as our next exhibit. What is the number of that?

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Defendant's Exhibit E. In evidence.

DEFENDANT'S EXHIBIT E

Western Union Telegram

NB91 Intl-CD Baires Via Allamerica 45/43 23

NLT Whipl

Harold A. Whipple Co.

316 Commercial St. Rm 208

1946 May 24 AM 1 59

Elevenhundredthirtyfive tons total available at onethirty stop Now signing contracts stop Must have confirmed credit ourtel today by Saturday otherwise sixhundred contract voided stop Also advise credit for balance immediately stop Additional fourhundredtons available subject prior sale at one-thirtyfive.

ENGRAW.

Q. (By Mr. Bronson): Mr. Whipple, I have a photostat of a letter written by you to Engraw, a letter dated May 23rd. Do you have that or is it in the hands of counsel?

A. It would be in the hands of counsel.

(Testimony of Harold A. Whipple.)

Mr. Bronson: I ask you to produce that, please?

Mr. E. B. Stanton: We stipulate that you can use this photostatic copy, in lieu of the original. We actually don't have it here.

Mr. Bronson: Do you have a copy?

Mr. E. B. Stanton: I have a copy.

Mr. Bronson: I only have one.

Mr. E. B. Stanton: I just have one copy here. It is the same thing.

Mr. Bronson: Do you have any objection to my using the white copy?

Mr. L. B. Stanton: Well, I think that is a copy of the other. This is a copy of a copy.

Mr. E. B. Stanton: That is a copy of a copy. All I ever had was a carbon copy.

Mr. Bronson: This was taken from the original.

Mr. E. B. Stanton: I believe this is a copy.

Mr. Bronson: All right.

Mr. E. B. Stanton: We will stipulate that there was an original letter so sent.

Q. (By Mr. Bronson): I will hand you a document just mentioned, Mr. Whipple, and ask you to identify it, if you will?

(Witness examines said document.)

Can you identify it?

A. Yes, that is a letter which I wrote. [61]

Mr. Bronson: I ask that this photostat be admitted as defendant's exhibit next in order.

The Clerk: Is it admitted, your Honor?

The Court: It may be received.

The Clerk: Defendant's Exhibit F in evidence.

(Testimony of Harold A. Whipple.)

DEFENDANT'S EXHIBIT F

May 23, 1946

Cia Engraw
San Martin 329
Buenos Aires
Argentina

Dear Mr. Berger:

referring to our enclosed cable confirmations on the subject of Glucose these answered yours as follows:

May 21

Subject prior sale sixhundred tons available price one thiry require twentyfive percent downpayment balance confirmed credit our order delivery one hundred fifty tons monthly starting July answer today will endeavor secure balance if you confirm new price."

May 22 NLT

Acting on your cable twentyfirst have completed firm purchases for account Shenley Distillers eleven hundred thirty five tons stop your use night letter lost July August deliveries offered are working on this stop have closed June delivery fifty tons July sixty August sept two hundred sept one hundred fifty october two seventyfive november two hundred December two hundred stop as contract is in argentine pesos assume purchaser is covering forward exchange more details tomorrow.

ENGRAW.

my 23 LC

(Testimony of Harold A. Whipple.)

urgent arrange immediately credit our order to cover sixhundred tons stop ask American bank cable first Boston here so can meet requirement one supply source market up today five cents.

ENGRAW.

We therefore confirm the sale of 1135 tons (metric) of glucose 43-45 baume, crystal clear, derived from incomplete hydrolysis cornstarch with a Balling of 81.8 upwards. "We have in our possession a confirming letter from Schenley authorizing us to secure up to 1300 tons for them in accordance with your earlier offer. And we have their verbal commitment and assurance that confirming letter is in the mail tonight covering the actual confirmation of the above.

They state that the actual letter of credit and purchase order will be cleared directly to you from their Louisville and New York offices via airmail (we will ask them to cable credit) just as soon as it can be issued.

We have sold this glucose to them at Pesos 1.375 per kg FOB Buenos Aires to include our overage of .075 pesos per kg. which we have asked you to confirm tonight with the understanding that payment will be remitted from the collecting bank here. We hope that you will be able to improve the shipping schedule for June July as they re most anxious to get larger deliveries as soon as possible.

H. W. CO.

(Testimony of Harold A. Whipple.)

Mr. E. B. Stanton: Mr. Bronson, I have found this.

Mr. Bronson: May I substitute a copy of it, please, if you don't object? It is a little more legible, I think.

Mr. E. B. Stanton: That is the one which was photostatted, with the initials on it.

Mr. Bronson: I am sorry.

Q. I show you a cable dated May 23rd, a night letter directed to Engraw, by Whipple, and showing received stamp in Buenos Aires on the 24th. Did you send such a cable?

A. That is right.

Mr. Bronson: I will ask that that be admitted and marked as the next exhibit for the defendant. It starts with "Schenley Credit Includes Our Overage"—

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Defendant's Exhibit G, in evidence.

DEFENDANT'S EXHIBIT G

The Western Telegraph Company Limited

No. 00256

Telegrama

WLH231 Losangeles Calif 26 23

NLT Engraw Baires

Schenley credit includes our overage you instruct

(Testimony of Harold A. Whipple.)

collecting bank remit us from proceeds please cable confirmation this arrangement what results trucks

WHIPPLE.

Q. (By Mr. Bronson): Another document, cable of May 23rd directed to Engraw by Whipple and showing it received on the same day in Buenos Aires, according to the stamp thereon. Did you sign that wire? [62]

A. That is right.

Q. Whose writing is on the foot of that?

A. I have no idea.

Q. It isn't yours?

A. Obviously not, since that is from Buenos Aires.

Mr. Bronson: I will ask that this be admitted and marked the next exhibit number.

The Clerk: Is this admitted in evidence, your Honor?

The Court: It will be received.

The Clerk: Defendant's Exhibit H, in evidence.

DEFENDANT'S EXHIBIT H

The Western Telegraph Company Limited

Telegrama

No. 00930

LH67 Losangeles Calif 23 23 1020A

Engraw Baires

Schenley issuing purchase order credit you

(Testimony of Harold A. Whipple.)

favor directly from New York 1135 tons soonest possible try improve June July shipments.

WHIPL.

Mr. Bronson: You have no objection to the use of this as a cable from Engraw to Whipple, dated May 24th?

Mr. L. B. Stanton: No, sir.

Mr. Bronson: I will ask that the telegram from Engraw to Whipple, dated May 24th, beginning "Re Telegrams Twenty Third, Will Arrange Yours as Requested," and ask that that be admitted as another exhibit.

The Clerk: Is this admitted in evidence?

The Court: It may be received.

The Clerk: Defendant's Exhibit I, in evidence.

DEFENDANT'S EXHIBIT I

Western Union Telegram

1945 May 24 PM 2 26

CDV 169 Intl-CD Baires Vie Allamerica 41 24

NLT Whipl

Losa

(Harold A. Whipple Co.)

(316 Commercial St.)

(Room 208)

Retels twentythird will arrange yours as requested stop No delivery change possible present purchases stop Total sixhundred additional avail-

(Testimony of Harold A. Whipple.)

able onethirtyfive subject prior sale onehundred
July onehundred August twowundred September
twohundred October advise maximum possible time
extension trucks.

ENGRAW.

Mr. Bronson: We offer, that is, with your stipulation that it may be offered, the wire signed by Engraw, directed to Whipple, dated May 27th, starting with "Awaiting Opening Credit Today" and I will ask that that be admitted as an exhibit. [63]

The Clerk: Is this admitted in evidence, your Honor?

The Court: Yes, it may be received.

The Clerk: As Defendant's Exhibit J, in evidence.

DEFENDANT'S EXHIBIT J

Western Union Telegram

1946 May 27 PM 3 29

NB731 Intl-CD Baires 11 27 607P Via All America

LC Whipl

Losa

(Harold A. Whipple Co.,

316 Commercial St.

Room 208)

Awaiting Opening Credit Today Rush Telegram
Bostonbank.

ENGRAW.

(Testimony of Harold A. Whipple.)

Q. (By Mr. Bronson): I will ask you to identify this next wire. It is directed to you from Engraw and dated May 27th. Did you receive that wire?

A. Yes.

Q. With regard to this wire, the first few words of it, they do not pertain to the glucose deal?

A. No.

Q. So that the expression "Expect trucks decision two weeks" may be disregarded for the purpose of this?

A. That is right.

Q. And the balance of it, of the subject has to do with the glucose transaction, does it not?

A. That is correct.

Mr. Bronson: I will ask that that be admitted in evidence as the next exhibit for the defendant.

The Clerk: Is this in evidence? Will this be admitted in evidence, your Honor?

The Court: It may be admitted.

The Clerk: Defendant's Exhibit K in evidence.

DEFENDANT'S EXHIBIT K

Western Union Telegram

1946 May 27 PM 11 08

NB 1089 Intl-CD Baires Via Allamerica 32/30 27

NTL Whipl

Losa

(Harold A. Whipple Co.

316 Commercial St.

Rm 208)

Expect Trucks decision twoweeks stop Firm price

(Testimony of Harold A. Whipple.)

glucose impossible maintaining offer subject prior sale stop Extension obtained until twentyeighth exclusive limit must have credit eleventhirtyfive tons.

ENGRAWENGRAW.

Mr. Bronson: Will there be any objection to this?

Mr. E. B. Stanton: No objection.

Mr. Bronson: We now offer in evidence, there being no [64] objection from counsel, a telegram directed to Whipple by Engraw, dated May 28th. I want to change that. It is from Whipple to Engraw on May 28th, and it shows the stamp of receipt in Buenos Aires on the same day.

The Clerk: Is this admitted, your Honor? Is this exhibit admitted, your Honor?

The Court: It may be received.

The Clerk: That is Defendant's Exhibit L, in evidence.

DEFENDANT'S EXHIBIT L

The Western Telegraph Company Limited

No. 00709

Telegrama

LH58 Losangeles Calif 14 28 1013A

Engraw Baires

Credit 1135 issued Newyork through chase or bankers cabling number later.

WHIPL.

(Testimony of Harold A. Whipple.)

Mr. Bronson: I might say, your Honor, just so the record may make some sense here, that without comment I am offering copies of certain of these cables and letters to the counsel for the plaintiff, so that he can secure the originals from his files. I have been doing that right along for the last several. Will there be objection to this being offered in evidence (indicating document)?

Mr. L. B. Stanton: No objection.

Mr. Bronson: A wire of May——

Mr. L. B. Stanton: I believe these are all immaterial, but we have no objection, if you wish them in, Mr. Bronson.

Mr. Bronson: Yes, we want them in. We offer now a wire——

Mr. L. B. Stanton: What is the date on this?

Mr. Bronson: The date shows it was started on May 29th and received on May 30th. It was directed by Engraw to Whipple and I will ask that that wire just described be [65] admitted in evidence as the next exhibit for the defendant.

The Court: It will be admitted.

The Clerk: Defendant's Exhibit M, in evidence.

(Testimony of Harold A. Whipple.)

DEFENDANT'S EXHIBIT M

Western Union Telegram

1946 May 30 AM 6 05

CDU23 Intl-CD Baires Via Allamerica 20/19

May 29

NLT Whipl

Losa

(Harold A. Whipple Co.

316 Commerical St. Em 208)

Without notice creditnumber urge cable Boston
bank could obtain extension withour guaranty stop
Please wire.

ENGRAW.

Mr. Bronson: I now offer, if there be no objection, a wire of May 31st directed by Whipple to Engraw, and ask that it be admitted to evidence as the next exhibit.

Mr. L. B. Stanton: I suggest that you show it to the witness.

Mr. Bronson: I beg your pardon?

Mr. L. B. Stanton: I would suggest that you show it to the witness.

Mr. Bronson: Yes. Do you want it shown to the witness?

Mr. L. B. Stanton: Yes.

(Mr. Bronson hands said document to the witness.)

(Testimony of Harold A. Whipple.)

The Witness: I would like to see the one of the previous day, that you just introduced, since this is in reply to it.

Q. (By Mr. Bronson): Can you supply that last exhibit (addressing clerk)?

That is Exhibit No. M.

(Mr. Bronson shows said exhibit to the witness.)

The Witness: All right.

Mr. Bronson: Just a moment, if your Honor please.

The Clerk: Is this admitted, your Honor?

The Court: Yes. [66]

The Clerk: That is Defendant's Exhibit N, in evidence.

DEFENDANT'S EXHIBIT N

The Western Telegraph Company Limited

No. 00643

Telegrama

DLH87 Losangeles Calif 15 31 1007A

LC Engraw Baires

Reurtel twentyninth cable whether credit received Sanfrancisco promised Newyork clearing twenty-eighth.

WHIPL.

Q. (By Mr. Bronson): I show you a wire here that is dated June 1st—rather, it is dated May 31st,

(Testimony of Harold A. Whipple.)

and a night letter directed to you by Mr. Berger. Did you get that wire about June 1st?

A. I would have to look at the calendar as to the date, Mr. Bronson, because there was a week end at that time.

Q. Well, have you a recollection regardless of the date of having received such a wire?

A. Oh, certainly.

Mr. Bronson: All right. I ask that that be admitted and marked with exhibit number next in order for the defendant.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Defendant's Exhibit O in evidence.

DEFENDANT'S EXHIBIT O

Western Union

NB 127 Intl-CD Baires Via Allamerica 23 31 NFT
NLT Whipl

(Harold A. Whipple Co.)

316 Commercial St. Rm 208

Losa

1946 Jun 1 AM 3

49

No information regarding credit have Sanfrancisco pressure Newyork also advise definitely what Newyorkbank if chase Ican pressure direct.

ENGRAW BERGER.

Whipl Ican.

(Testimony of Harold A. Whipple.)

Q. (By Mr. Bronson): Here is a wire, Mr. Whipple, signed by the name Whipple and directed to Engraw, carrying date June 5th and showing June 6th receipt in Buenos Aires; did you send such a wire? A. That is right.

Mr. Bronson: I will ask that this be admitted and marked next in order.

The Clerk: Is this admitted, your Honor?

The Court: Yes. [67]

The Court: Yes.

The Clerk: That is Defendant's Exhibit P in evidence.

DEFENDANT'S EXHIBIT P

The Western Telegraph Company Limited
WLH203 Losangeles Calif 42 5
NLT Engraw Baires

Obtained return of portion of original sample today forwarded to Schenley laboratory Chicago demanded they furnish us specifications why require for acceptance suggested analysis certificate each shipment by superintendence company or other quoted analysis contained your cable today.

WHIPL.

Mr. E. B. Stanton: We put this one in.

Mr. Bronson: What?

Mr. E. B. Stanton: This is one we put in evidence.

(Testimony of Harold A. Whipple.)

Mr. Bronson: What exhibit would that be, counsel, Exhibit 14, the last one?

Mr. E. B. Stanton: Yes, that would be 14.

Q. (By Mr. Bronson): Now, as I understand it, Mr. Whipple, when you sent this telegram to Buenos Aires on May 20th, reading, "Confirming Sale of 1300 Tons of Glucose Accordance Offer April 24 May 9. Cable Earliest Shipping San Francisco whose name credit. Can You Increase Earlier Shipments."

You contended you had a sale at that time to Schenley of 1300 tons, is that your statement?

A. That is correct. [68]

Q. Is it also true that when you sent——

The Clerk: Your Honor, there seems to be a diversity of opinion here as to whether these telegrams and exhibits are to be copied into the record.

The Court: Well, if I did not say that they are to be copied into any record to be prepared——

The Clerk: The question is whether they go into the reporters' transcript as they are preparing it now.

The Court: That is up to counsel. They are ordering a daily transcript. That is up to them.

Mr. Bronson: I think they should be copied into the record, your Honor.

The Court: That is all right with me. As you gentlemen know, I never request a transcript and I have no funds with which to pay for one unless you complimentarily give me a copy. I follow the

(Testimony of Harold A. Whipple.)

testimony and I do not ask for it. I just completed a long anti-trust case without a transcript.

Mr. Bronson: I wonder if I could have a word with these gentlemen.

The Court: And I do not ask for a transcript.

Mr. Bronson: I thought I had understood your Honor's reporters this morning correctly. They are preparing a copy for you.

The Court: If they prepare one for my use it is all right. [69]

Mr. Bronson: I think it will simplify your Honor's work in going through the transcript to have the exhibits set forth.

The Court: That is all right.

Mr. Bronson: They can be capitalized so it shows, leaving out the unessentials such as headings and fine type and print.

The Court: All right; go ahead.

Q. (By Mr. Bronson): Mr. Whipple, when you sent the telegram, Exhibit B, on May 21st to Buenos Aires:

"Accept 600 Tons One Thirty Shipments One Hundred Fifty Monthly Will Accept Balance as Available Same Price Schenley Distillers Will Open Credit Entire Amount but No Cash Deposit Try Ship During June Cable Confirmation"

was it your contention at that time that you had made a sale to Schenley of any glucose?

A. That is covered by Mr. Baglin's letter of the 20th.

(Testimony of Harold A. Whipple.)

Q. Is that the one I showed you, Exhibit 2, in which he said, "We are interested in purchasing up to a thousand tons"?

A. No, sir. No, sir; there is a letter following that. I beg your pardon. Not Mr. Baglin's; Mr. Donnelly's letter of the 23rd.

Q. The wire that I have just called your attention [70] to you have seen.

The Court: You are reading No. C?

Mr. Bronson: No. C, yes, sir.

The Court: All right. I just wanted to know what the examination relates to.

Q. (By Mr. Bronson): Mr. Whipple, I am calling your attention to a wire which you sent on the 21st of May which I just read to you.

A. Yes.

Q. Is it your contention that at the time that you sold that and that you sent that wire, that you had sold any glucose whatever to Schenley?

Mr. L. B. Stanton: I will object to that as calling for a conclusion of the witness. The wire speaks for itself.

Mr. Bronson: The contents of the wire speaks for itself, true.

Mr. L. B. Stanton: But what his intention was or his thoughts were is one thing.

Mr. Bronson: Will you answer the question?

The Court: I think it is answered. It goes into a matter of opinion, Mr. Bronson. I will sustain the objection.

(Testimony of Harold A. Whipple.)

Q. (By Mr. Bronson): You testified this morning with regard to a conversation that you had with Mr. Woolsey about June 5th or 6th in which he notified you of the position that [71] the company took with regard to the transaction, testifying this morning that he stated to you that the company did not intend to fulfill its contract. Do you recall that testimony you gave this morning?

A. Yes, sir.

Q. When you sent the wire to your principals to South America, you stated the reasons that he had given you on the phone, did you not?

A. Would you read the wire, please?

Q. Yes; I will read it. I will read it to you.

“Schenley legal department San Francisco phones advise Cincinnati refuses complete contract claiming no contract because formal purchase order and credit not issued stop Effectively repudiates signature their San Francisco employee stop We requested responsible official put cancellation in writing stating reasons doubtful they will comply.”

A. That is correct.

Q. Isn't it true what Mr. Woolsey of the Legal Department told you was that there was no contract; that that was the position of the company that there was no contract because there was no purchase order or credit issued as yet?

A. He informed me that was the position of the company.

(Testimony of Harold A. Whipple.)

Q. In other words, you want to be understood that [72] way, rather than the statement that you said this morning that they did not intend to fulfill a contract; he did not use those words to you, did he, Mr. Whipple?

A. No, sir; I don't think he did.

Q. You also stated this morning that Mr. Woolsey told you in this conversation that Donnelly was not a responsible officer. As a matter of fact no such statement was made by Mr. Woolsey, was it?

A. Yes, sir; I believe it was.

Q. Calling your attention to the fact that such statement is not included in the wire that you sent to South America, is there any reason for your leaving out that particular thing that you say Mr. Woolsey said as a reason?

A. There would be no reason for me——

Mr. E. B. Stanton: One moment, Mr. Whipple. I think the wire does speak for itself in that regard.

The Court: Which wire are you talking of, the same one or another one?

The Witness: Yes, sir.

The Court: Are you still talking about C or a different one?

Mr. Bronson: This is Plaintiff's 14 of this morning, the last exhibit they put in this morning.

Mr. E. B. Stanton: It does not say "Respectfully Repudiates Signature". [73]

Mr. Bronson: No, "Effectively Repudiates Signature".

(Testimony of Harold A. Whipple.)

Mr. E. B. Stanton: A play on different words.

The Court: All right, go ahead.

Q. (By Mr. Bronson): Did you say that it is your recollection Mr. Woolsey made such statement?

A. Yes, sir.

Q. With regard to Mr. Donnelly's authority?

A. Yes, sir.

Q. And your counsel has called attention to the language "Effectively Repudiates Signature".

A. Yes, sir.

Q. And read that as your comment on what you considered that Mr. Woolsey's statement amounted to. Is that a correct interpretation of it, where you said "Effectively Repudiates Signature Their San Francisco Employee"?

Mr. L. B. Stanton: I have an objection to the examination along that line. The wire speaks for itself.

The Court: Well, no, I don't know. The witness has given the oral conversation which is a direct statement or a direct quotation to the effect that the person did not have any authority, while here the language does not on its face bear that interpretation because, to say "effectively repudiates signature" is merely the result of it but does not give the reason. "Effectively repudiates signature their San Francisco employee stop We requested responsible [74] official put cancellation in writing stating reasons doubtful they will comply." Now, you see, that second paragraph certainly

(Testimony of Harold A. Whipple.)

contradicts the idea that the statement which precedes it meant to imply that Mr. Woolsey had given the reason, because he is asking for the reason at the present time.

Overruled. Go ahead. Have you answered?

Mr. Bronson: Would you like me to repeat the question?

The Witness: Please repeat the question.

Q. (By Mr. Bronson): Reading a portion of this just preliminary to the question, you said: "Schenley Legal Department San Francisco phones advise Cincinnati refuses complete contract claiming no contract because formal purchase order and credit not issued stop Effectively repudiates signature their San Francisco employee stop." My question was: I interpreted that last expression "effectively repudiates signature" as your comment and your effect or your idea of the effect of what Mr. Woolsey had told you. Am I correct in that?

A. You are asking, Mr. Bronson, for an interpretation of a wording which is two years old.

Q. Yes. I am going to give you this. You stated up to the word "stop" what Mr. Woolsey said he was claiming, and then you started in something else, did you not, mainly to indicate an interpretation you put upon Mr. Woolsey's [75] statement?

A. That is correct.

Q. Actually, Mr. Woolsey told you that it was Schenley's position that there was no contract at all, words indicating that effect—true?

(Testimony of Harold A. Whipple.)

A. Yes.

Q. And he told you that the parties to the contract or the proposed contract had never agreed upon specifications; isn't that true?

A. No, sir.

Q. He did not say that?

A. Not to my recollection.

Q. Do you recall that he said anything about the fact that samples had not been approved?

A. No, sir.

Q. Did he tell you that Schenley had never issued any purchase order and that they had never put up the letter of credit and that that was, in their opinion, the reason why there had as yet been no contract effected?

A. Something to that effect, which I differed with.

Q. As you got it, as you recall it?

The Court: All right.

Mr. Bronson: Just a moment, if your Honor please. We have this trouble with so many exhibits.

The Court: I will tell you what I will do. I will [76] declare a recess and I will go over and see how quickly I can be relieved from the conference.

Mr. L. B. Stanton: If it would be convenient to your Honor, we might as well have the rest of the afternoon.

The Court: No. Let us complete with this witness. I suggested that this morning but you did not agree, and so I will go over to the meeting and see

(Testimony of Harold A. Whipple.)

how quickly I can be excused, and then we can complete the examination of this witness and I can return later.

(Short intermission.) [77]

The Court: You may proceed with the cross-examination of this witness.

Mr. Bronson: Have you the defendant's exhibits there?

The Clerk: The Court has them.

Mr. Bronson: That is all right.

The Court: Yes, sir, I have them. I am through with them.

Mr. Bronson: I have copies of them, Judge.

The Court: No. That is all right. I am through with them.

(Defendant's exhibits handed to Mr. Bronson.)

Mr. Bronson: May I proceed, now, your Honor?

The Court: Yes.

Q. (By Mr. Bronson): First, with regard to the date upon which you first were spoken to by Mr. Donnelly, you stated it was around about the 20th—you stated it was around about the 14th, as I understand, of May? A. That is right.

Q. Looking at your deposition in which you gave a date, I am reading from page 8, "I believe May 20th, I believe May 19th or 20th, I may be wrong by two or three days?" A. Yes.

Q. That is the conversation, the first phone call you had from Mr. Donnelly?

(Testimony of Harold A. Whipple.)

A. Yes. I later substantiated that it was May 14th. [78]

Q. You have substantiated that since the deposition?

A. That is right.

Q. By reference to what, if I may ask?

A. By reference to the correspondence and by reference to the time elapsed necessary between the various things and by reference to the deposition of both Mr. Donnelly and Mr. Baglin.

Q. Well, what correspondence did you refer to that assisted you in correcting the date when you first had a conversation with Mr. Donnelly?

A. Well, I have re-read all of the telegrams and everything concerning this case since that time, Mr. Bronson. I say, as I specified at that time, I could not be sure within a matter of several days as to the date, at that time.

Q. All right. Now, will you take this letter here that you wrote to Schenley Distillers, attention Mr. Baglin, on May 21st, 1946 (It is marked Exhibit 3), you quote in opening portion of that letter two telegrams, without giving their dates. I will hand you now Defendant's Exhibit C and Defendant's Exhibit B, and ask you if those two exhibits of the defendant are the telegrams that you were quoting in your letter to Mr. Baglin on May 21st that is marked Plaintiff's Exhibit 3?

A. Both of these are quoted in here.

Q. Yes. [79]

A. Exhibit B, being the first one.

(Testimony of Harold A. Whipple.)

Q. Exhibit B is the first one that is quoted in your letter. A. That is right.

Q. Well, compare that. You left off a portion of that telegram, did you not, in sending it to Mr. Baglin?

A. "Subject to prior sale," that is correct.

Q. All right. So, when you said, "confirming our telephone conversation today regarding Argentine glucose we quote from cable received today from our principals in Buenos Aires as follows, "six hundred tons available," leaving off the expression "subject to prior sale," is that correct?

A. That is correct.

Q. Now, going further in that exhibit "3", you say: "price 1.375 (pesos per kilo)." You did not quote that, of course, did you?

A. I did not—I did not quote the telegram to Mr. Baglin exactly as I had received it from Engraw.

Q. Let us get this: You put it within quotation marks in your letter to Mr. Baglin, did you not? Just look at the letter and confirm that fact.

A. Yes, that is correct.

Q. And you changed it, quoting it to him, the expression "one thirty" in the letter to "1.375," correct? [80] A. That is correct.

Q. By what authority did you do that? Did the people that you refer to as your principals authorize you to do that? A. Yes.

Q. Where is your authority? Have you it in some written form? A. No, sir.

(Testimony of Harold A. Whipple.)

Q. What form did it come to you in?

A. It was generally understood. In fact, I had it verbally in discussions approximately a year previous, discussions in Los Angeles with Mr. Berger when we first started negotiations of any sort.

Q. That at any time you quoted their prices, quoted a cable, that you could distort it in that manner, Mr. Whipple?

A. I quoted from a cable. I did not quote Mr. Baglin or state to Mr. Baglin that I quoted the entire cable complete. I quoted from a cable.

Q. You felt that authorized you to change the price within it? A. I certainly did.

Q. Now, take the other exhibit, if you will. You made the same distortion there in quoting the second cable that you set forth within quotation marks in the letter to Mr. Baglin with regard to price changed from one thirty as it appears [81] in the cable to as it is here one thirty-seven and one-half, correct? A. That is correct. [82]

Q. Who was it told you that you had authority to do that? A. Sir?

Q. Who was it in the Engraw organization that told you, that you said it happened a year before?

A. Mr. Berger is the only contact I have had with the Engraw organization.

Q. Did you ever have any discussion either by letter or cable with the Engraw Company about the quotation that you have made in this transaction subsequent to May 23rd? A. Yes.

(Testimony of Harold A. Whipple.)

Q. You confirmed, in any event, the purported sale, if I may refer to it that way, of 600 tons at 1.30 rather than 1.375, did you not? A. No.

Q. Will you state, Mr. Whipple, when it was—I will withdraw that question for a moment. Let me ask you, did you ever confirm to Engraw any glucose, that is, prior to May 23, 1946, at a price of 1.375? A. On May the 23rd, yes.

Q. No; prior to that date? A. No.

Q. I will ask you this, Mr. Whipple: When you first sent forward to Engraw the letter of May 23rd signed by Mr. Donnelly?

A. I believe on June 6th. [83]

Q. Well, then, up until that time, so far as any information that you gave to them, they were ignorant of the terms of the letter itself, is that true?

A. No, sir.

Q. Now, explicitly, were they aware of the contents of the postscript in that letter?

A. What is the postscript in that letter?

Q. I will read it to you if you haven't it in mind.

“P. S. Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial S. A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept.—200; September—150; October—275; November—200; December—200. The conditions of acceptance of this quantity are the same as those outlined for the 600 tons. The offer

(Testimony of Harold A. Whipple.)

of 600 tons is considered superseded by the foregoing."

My question is this: They were ignorant of the conditions attached to that postscript——

A. No, sir.

Q. ——until June 6th of 1946, is that your testimony?

A. No, sir; I do not think so. I believe on my telegram of May the 23rd and my confirming letter of May the 23rd it was covered in sufficient detail.

Q. Well, all that you told them, in other words, about that subject is what you put in the telegrams that you have last mentioned?

A. I might refer to the record?

Q. Well, you may, surely. I will have to hand you the whole sheaf. You start at the bottom and go up. Have you found a telegram?

A. My letter of May the 23rd.

"We therefore confirm the sale of 1135 tons (metric) of"—and I quoted from Mr. Donnelly's letter the specifications—"43-45 baume, crystal clear, derived from incomplete hydrolysis of corn-starch with a Balling of 81.8 upwards." I had at that time their verbal commitment and the promise of their letter which refers to Mr. Donnelly's letter of the 23rd.

Q. When did you inform them for the first time of the language of the postscript in which Mr. Donnelly said that the action was conditioned upon all of the specifications that appear above in the letter,

(Testimony of Harold A. Whipple.)

specifically the letter of credit and a purchase order that was signed by your principals?

A. I furnished them with the letter on June the 6th.

Q. That is the first they had of that? [85]

A. The first copy they had of that contract.

Q. Have you any interest in the outcome of this suit, Mr. Whipple?

A. Yes, sir.

Q. A money interest?

A. Yes, sir.

Q. As a matter of fact you engaged counsel, did you not, for this concern here in Los Angeles?

A. No, sir.

Q. Well, didn't you go and see Mr. Stanton shortly after June 6th?

A. I certainly did, I believe on the date of June 6th.

Q. Well, I only suggest it was out of that contact that his representation of the plaintiff arose?

A. That is a question for Mr. Stanton to answer.

Mr. Bronson: All right. That is all, your Honor, at this time.

Mr. L. B. Stanton: I will say very frankly that it was not in any respect.

Mr. E. B. Stanton: Mr. Whipple, will you stay on the stand just a moment? I have a few questions on redirect.

Redirect Examination

By Mr. E. B. Stanton:

Q. Mr. Whipple, I show you this telegram to

(Testimony of Harold A. Whipple.)

Engraw [86] signed by yourself, dated May 24th.
Do you recognize that? A. Yes; I do.

Q. You sent that wire to Engraw on the date shown?
A. That is right.

Mr. E. B. Stanton: I ask that this be introduced as Plaintiff's next in order.

The Clerk: Is this admitted, your Honor?

The Court: Yes; it may be received.

The Clerk: That will be Plaintiff's Exhibit 16 in evidence.

PLAINTIFF'S EXHIBIT 16

The Western Telegraph Company Limited
No. 00999

LH74 Los Angeles Calif 21 24 205P

Engraw Baires

Schenley processing credit 1135 tons but doubtful
New York will clear before Monday will not stand
further increase

WHIPL

The Court: All right.

Mr. E. B. Stanton: I am waiting for counsel to read the letter.

Q. Mr. Whipple, this matter of the 1300 tons which you mention in one of the cables that is in evidence, had you received communication relative to 1300 tons at any time from Engraw?

(Testimony of Harold A. Whipple.)

A. Yes; I had.

Q. I show you this wire dated April 24th addressed to "Whipl" and signed "Engraw" and ask if you have seen that before?

A. Yes; I have.

Mr. E. B. Stanton: I will ask that this be introduced in evidence as plaintiff's next exhibit in order. [87]

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 17 in evidence.

PLAINTIFF'S EXHIBIT 17

Western Union Telegram

1946 Apr 24 AM 4 33

NB138 Intl Cd Baires via RCA 46/45 23

NLT

(Harold A. Whipple Co.)

(316 Commercial St., Room 308.)

Losa

Can obtain thirteenhundred tons glucose specification ourlet third delivery May fifty June thru September one hundred each October November twohundredseventyfive each December threehundred price net pesos Argentine onetwentyfive fob Baires including barrels and our commission cable answer immediately offer subject our confirmation

ENGRAW

(Testimony of Harold A. Whipple.)

Q. (By Mr. E. B. Stanton): That is where you got the idea of the 1300 tons originally?

A. That is correct.

Q. I show you a letter dated April 3rd on the stationery of Compania Engraw, addressed to "Harold A. Whipple," signed "Cia. Engraw Commercial E. Industrial Andres del Borgia" and ask you if you received that letter?

A. Yes; I did.

Q. Calling your attention, Mr. Whipple, to the third from the last paragraph and reading from the letter—fourth from the last paragraph:

"As you can see, our position—yours and ours—is that of only intermediaries and only as such can we reach to a conclusion.

"Our commission will be only 1%. Accordingly, we hope that you will be in a position to reserve for us from your commission an equitable part for it is only fair that if your consumer can obtain a lower price you can ask a higher commission. We shall await further word from you as to this matter."

Does that refresh your recollection to any degree regarding the arrangement that you had concerning this [88] difference between 1.30 and 1.375 which you quoted?

A. Yes. We had discussed in previous correspondence two or three alternative methods of handling this business, one which I had urged upon them was that I should act strictly as their representative and that any overage which was estab-

(Testimony of Harold A. Whipple.)

lished here could be participated in on a basis to be agreed upon between us. Another, that I should act as a buying agent for the domestic user, collecting a buying commission from the user here.

There had been no definite commitment at the time that this transaction was negotiated which of those methods would be used. The original understanding from this letter which you have just shown me was that they would quote for the account of the supplier down there. Subsequently their cable, cabled instructions, was that the letter of credit should be opened in their name. I therefore assumed that they had adopted and accepted the second method which I had suggested of working directly for them, rather than for someone else down there whom I did not know and was not in a position to judge whether I could trust or not.

Q. Did you ever receive confirmation of their acceptance of the second method in writing?

A. No.

Q. Mr. Whipple, I show you a letter here dated June the 3rd, 1946. Will you read this, please? It is on the [89] stationery of Engraw, signed "G. Fred Berger."

While the witness is reading that letter I would like to introduce this letter previously identified, dated April 3rd.

Mr. Bronson: What is the number of that exhibit?

The Clerk: Is it admitted, your Honor?

The Court: Yes.

(Testimony of Harold A. Whipple.)

The Clerk: That is Plaintiff's Exhibit 18 in evidence.

PLAINTIFF'S EXHIBIT 18

Compania Engraw
Commercial & Industrial S. A.
Beunos Aires (Argentina)

April 3rd, DE 1946

Mr. Harold A. Whipple,
H. A. Whipple & Co.,
316 Commercial Street,
Los Angeles 12, Calif.

Ref: Glucose

Dear Mr. Whipple:

Following the letter sent to you by Mr. Berger under date of March 20th regarding glucose, I have the pleasure to send you the further information regarding the market for this product.

I wish first to confirm your telegram of March 26th, reading as follows:

“Three and half yard dump truck steel body hydraulic lift heavy reinforcing original scout chassis 2000 dollars FOB Los Angeles relet 20th glucose wire best October price thousand barrel lots what monthly quantity available believe possible contract your full production.”

Thank you for the information regarding the dump truck. As soon as we have any information regarding same, we shall let you know.

(Testimony of Harold A. Whipple.)

Referring to the glucose, as we noted, there are only two manufacturers in this country. Their production is sold part to the local market and part is exported.

Regarding the export production, the factories are only interested to sell directly thru their representative here to the consumer of the glucose in the United States for they do not wish to deal with speculators.

We contacted immediately the two representatives of the two manufacturers of glucose and now we are in a position to inform you about the changes that have taken place during this period on account of the great demand for such product.

One of the representatives informed us that the market does not admit any definite agreement being the production of the factory already taken. We might obtain thru this representative, around 500 tons for shipment before October, possibly for June or July buying a part from the factory direct and a part from the speculators in the market here if we are allowed to buy up to Arg. Pesos \$1.20 per kilo, F.O.B. Buenos Aires.

The other representative of the most important of the two factories hopes to be in a position to offer thru his representative in New York to the consumer you will appoint who will open the letter of credit to his favor here in Buenos Aires.

This representative will call us before the end of this month to inform us if the factory is in a condition to ship the lot of 1000 barrels required by

(Testimony of Harold A. Whipple.)

you and also to inform us regarding the monthly quantity available in the future.

In the meantime, we secured the specification of the glucose and analysis of the product which they manufacture. There are two classes of glucose; liquid and solid.

From your letter of March 27th, which reached our desk on April 2nd, you ask us to send you a flask as a sample and we did so as of today, sending same by air express parcel being this sample of glucose liquid. When you reply to this letter, please inform us if you require solid or liquid glucose.

The specifications of the liquid glucose sent to you, are the following:

43/45° Baume—not more than .005 SO₂

The barrels are made of American Gunwood and the net weight is 300 kilos and the gross weight 330 kilos.

We are advised that the factory will be in a position to make a very good offer notwithstanding that the market is actually at Arg. Pesos \$1.02 per kilo. Their offer would be less for they are not interesting in following the market price.

As you can see, our position—yours and ours—is that of only intermediaries and only as such can we reach a conclusion.

Our commission will be only 1%. Accordingly, we hope that you will be in a position to reserve for us from your commission an equitable part for it is only fair that if your consumer can obtain a lower

(Testimony of Harold A. Whipple.)

price you can ask a higher commission. We shall await further word from you as to this matter.

As to the monthly quantities available after October, we do not believe we shall be able to get the full production of the factory as they do not want to sell to only one consumer in consideration that they do not want to lose the actual customers they now have.

Regarding the letter of authorization requested by you to solicit orders for the factory, I wish to remind you that the representative of the factory here has his agent in New York. For this reason it will obviously be not possible to send you the letter of authorization. Instead, you will have to inform us each time the name of the purchaser and the quantity needed.

Cordially yours,

CIA. ENGRAW COMERCIAL
E INDUSTRIAL S.A.

/s/ ANDRES DEL BORGIA,
Import Manager.

ADB:MBF

A. Mr. Stanton, in view of this letter I would like to change my previous testimony.

Q. (By Mr. E. B. Stanton): Has that letter refreshed your recollection in any regard?

A. This letter refreshes my recollection to the extent that they did in fact on June the 3rd confirm the arrangement as to our overage.

(Testimony of Harold A. Whipple.)

Q. Would you read the portion of the letter which calls that to your attention?

A. "I note your second last paragraph with regard to your overage and we have confirmed that we will take the steps necessary to see that you receive this. Just how this can be arranged, I am not certain and of course, we are awaiting the receipt of the letter of credit so that we can know its terms and will then discuss the matter with the First National Bank of Boston here in order to determine the [90] method whereby we can protect you for your coverage and take the steps necessary to see that you obtain it."

Q. When they speak of "overage" that means your commission, does it, as selling agent?

A. That is right.

Mr. E. B. Stanton: I will ask that this letter be introduced as Plaintiff's next in order.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 19 in evidence. [91]

(Testimony of Harold A. Whipple.)

PLAINTIFF'S EXHIBIT 19

Compania Engraw
Commercial & Industrial S. A.

New address:

San Martin 329, P. 3.

Tel. 31-8311.

Buenos Aires, Argentina

June 3rd, DE 1946.

Mr. Harold A. Whipple,

H. A. Whipple & Co.,

316 Commercial Street,

Los Angeles 12, Calif.

Dear Mr. Whipple:

Your airmail letter of May 23rd, reached our office while I was in Montevideo, so I am just now in a position to reply to it.

In the meantime, I have been following closely the inter-change of telegrams with regard to the completion of our contracts for 1535 tons of glucose and on Friday night, I cabled you asking you to have the San Francisco bank pressure New York for at least the cable number of the letter of credit and also the definite name of the New York Bank which is issuing the credit for if I have that information, I can do some personal pressuring from my end. As a former New York State bank examiner, I have ample contacts in any of the big New York banks, so direct cable will be of assistance in supplying the information we need for we have had to do a real job of salesmanship here in order to

(Testimony of Harold A. Whipple.)

avoid cancellation of contracts because we could not deliver at least the credit number and the name of the bank issuing the credit.

Naturally, as these contracts are in Argentine Pesos, I can understand that there may be some delay in processing the credit in New York, but there is no reason why we should be delayed in receiving at least the credit number which would serve to eliminate most of our troubles.

We note your request to step up the shipping schedule but for June, that will be impossible. It is only thru the best of luck that we were able to tie in any for June and in order to do that, we have had to purchase and pay the 50 tons for our own account, pending the receipt of the letter of credit.

The delivery schedule of the 1535 tons is as follows:

June	50 tons
July	160 "
August	100 "
Aug.-Sept.	200 "
September	250 "
October	375 "
November	200 "
December	200 "
<hr/>	
1535 tons	

I note your second last paragraph with regard to your overage and we have confirmed that we will take the steps necessary to see that you receive this.

(Testimony of Harold A. Whipple.)

Just how this can be arranged, I am not certain and of course, we are awaiting the receipt of the letter of credit so that we can know its terms and will then discuss the matter with the First National Bank of Boston here in order to determine the method whereby we can protect you for your coverage and take the steps necessary to see that you obtain it.

In this connection, I also note that you feel that it is possible for you to arrange a contract with Schenley for 1947. With this arrangement, we are, of course, entirely in accord and as soon as you give us definite information (which I hope will be at a very early date—before the speculators close with the sources we have available) we will take the steps necessary to provide for closing the contracts.

Then, I think we should also have an understanding as between yourselves and ourselves with regard to the commissions or overcharges involved. Actually, on this particular contract, for the balance of 1946, we have had to make our purchases F.A.S. and after paying the necessary charges, including custom brokers, etc. we will net about 0.5 centavos per kilo but with that, we also have the risk of having to pick up deliveries of glucose if the coordination and the arrival of a steamer should not coincide and this may well cut into our profit margin if we should have any bad luck from a steamer point of view.

(Testimony of Harold A. Whipple.)

I don't know what costs you have on your 71½ centavos per kilo but I believe that we should coordinate our efforts first, in order that there may be a proper division of the commissions or overages available and second, that we may know, in determining the price we can afford to pay, and also in determining the price at which the glucose should be offered.

We certainly want to be fair to you but we believe you also desire to be fair to us and if we are to arrange a program of this sort to carry on in the future, regardless of the price of glucose, it should be with a complete understanding of the manner in which your and our interests will be compensated.

Then too, there is another factor which disturbs me somewhat for I am sure you realize the danger on basing this program entirely on only one customer. In an earlier letter, you mentioned your interest in establishing yourselves as sellers of glucose in many areas of the United States and if we are both "on the job", you can develop the market and we the sources and establish a continuing business with profit to both of us. But I cannot help but feel that your interest and ours, would be much better served if we not only close a contract with Schenley for the present but that you also develop your other markets using perhaps the other alternative, i.e., a sliding scale alternative until you have your market so developed that with firm contracts we can also cover them for a whole year or a large portion of the year at firm prices.

(Testimony of Harold A. Whipple.)

I shall be most interested to hear from you at an early date with regard to this, but particularly would be interested in word from you as to the development of a more diversified group of customers on whom we both can depend for continuing business as you establish your market and we establish our sources.

For your further information, this letter is to advise you that there are also available, quantities of corn starch which are presently priced at \$1.15 per kilo, F.O.B. Buenos Aires. There are available right now, 50 to 100 tons monthly, starting July till December. The shipment of corn starch is made in double bags, the inner one is made of a special paper and the outside bag is of cotton. The net weight is 50 fillos each.

There are also available 100 to 200 tons of honey, ready to be shipped. 50 to 100 monthly, which presently is priced at x Pesos \$1.25 F.O.B. Buenos Aires.

The honey would be ready for shipment at the end of June and also in July and August. The exportation of same is made in barrels of gum-wood, similar to the barrels of glucose and the weight is 300 kilos net and 330 gross.

If you should have any interest in either of these items, please advise us by cable as to the quantities, deliveries needed, etc., giving us a firm price at which to establish our contacts or better yet, giving us a range within which we should do business.

(Testimony of Harold A. Whipple.)

I cannot help but regret that you did not accept our earlier suggestion on glucose which was along similar lines i. e., that you give us a range and quantities desired and let us take the steps necessary to cover.

Such a condition makes it definitely imperative that we arrange our respective programs with "all the cards on the table" so that we will both know the manner in which we must deal with the entire program in order that both our organizations may deal with it with continuing success.

With kindest regards and looking forward to hear from you at a very early date, I am,

Sincerely yours,

CIA. ENGRAW COMERCIAL
E INDUSTRIAL S.A.

/s/ G. FRED BERGER,
President.

GFB:MBF

Q. (By Mr. E. B. Stanton): Mr. Whipple, I show you what purports to be a copy of a telegram dated May 20th to Whipple, signed Engraw, and ask you if you recall receiving such a cable as that?

A. Yes.

Mr. E. B. Stanton: Now counsel has stipulated that I may use this copy in place of the original for my next exhibit.

The Court: All right.

The Clerk: Plaintiff's Exhibit 20, in evidence.

(Testimony of Harold A. Whipple.)

PLAINTIFF'S EXHIBIT 20

All America Cables and Radio

May 20th, 1946

Carta Telegrafica
(1/3 De la Tarifa)

NLT Whipl

Los Angeles

You cannot delay twelve days and expect same price market fluctuating seriously immediate answer required if interested at onetwentyeight also need answer ourlet ninth recontract for nineteenforty-seven.

ENGRAW.

CIA. ENGRAW COMERCIAL
E INDUSTRIAL S.A.

G. FRED BERGER,
President.

Q. (By Mr. E. B. Stanton): Referring to that cable for the moment, Mr. Whipple:

“You cannot delay twelve days and expect same price market fluctuating seriously immediate answer required interested at onetwentyeight also need answer ourlet ninth recontract for nineteenforty-seven.”

To what does that cable refer, Mr. Whipple?

The Witness: Previously——

Mr. Bronson: I think that the cable is the best evidence of what it refers to, if you want to——

Mr. E. B. Stanton: Well, I am speaking of

(Testimony of Harold A. Whipple.)

when the cable says: "You cannot delay twelve days." What delay was that?

A. That would refer to communication from Engraw of May 9th, I believe, in which they had quoted the 1300 tons [92] at one twenty five. That is my present recollection, without referring to the papers.

Q. Then you sent your telegram on May 20th confirming 1300 tons and you received this by way of reply?

A. That is right.

Mr. E. B. Stanton: That is all.

The Court: Have you any further questions?

Mr. Bronson: I have this in mind, Judge: That there are some long letters put in here, that they are new matter to us; we haven't seen them before. I would suggest that there may be. Mr. Whipple lives here. We could call him back later and we can reopen at any time.

Mr. L. B. Stanton: I will so stipulate.

Mr. Bronson: He will be available.

The Court: Well, I do not like to leave cross examination open—if you want to leave it open until tomorrow, all right, but I don't want to leave it open——

Mr. Bronson: Until tomorrow morning, then.

The Court: Well, you can leave it open until tomorrow morning.

Mr. Bronson: That is all I want to ask.

The Court: All right. We will reserve it.

Mr. L. B. Stanton: You want him back the first thing in the morning?

(Testimony of Harold A. Whipple.)

Mr. Bronson: Yes. I don't like to bother him, but it [93] would be safer to have him here.

The Court: All right. Then, subject to that, you will return tomorrow morning——

The Witness: Yes, sir.

The Court: ——for any further cross examination. After that, we will excuse him, unless you recall him. All right. 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken until Wednesday, June 2, 1948, at 10:00 o'clock a.m.)

REPORTERS' TRANSCRIPT OF PROCEEDINGS

Wednesday, June 2, 1948

The Court: All right, gentlemen, let us proceed.

Mr. Bronson: Before I proceed this morning, I might say, if your Honor please, that I discussed with counsel for the plaintiff the matter of your Honor considering the depositions that will be offered in evidence here, whether they are to be read from the witness stand or whether your Honor will read them yourself?

The Court: Well, my custom is, if they are offered, to order them transcribed in the record and I read them in between time, but before I do that, I either pass on objections that are made that are contained in them or ask for a stipulation waiving

the objections, because otherwise, to use the language of the street, I am buying a pig in a poke.

Mr. Bronson: Yes, that is right.

The Court: And I don't do that.

So, if you gentlemen would either stipulate, as I have indicated, or we will take up the specific objections as to each.

You need not take time to read them. I can read them faster myself and I don't mind reading in between, and I will read them before the case is ready for argument. That covers the situation.

Mr. Bronson: You take up your objections verbally, [151] rather than by written specifications or objections at the time the depositions are submitted?

The Court: Well, I presume the depositions are in the usual form and they reserve all objections except as to form.

Mr. Bronson: A great many of them are on written interrogatories, your Honor.

The Court: Well, where there are written interrogatories, there is no need to repeat the objections, because you made your objections at the time that the interrogatories were propounded, and it is repetitious to repeat the objections.

Mr. Bronson: All right.

The Court: Any objection, now, insofar as to an interrogatory is concerned, should relate to the answers, namely, that the answer is not germane to the subject. Many a time a question appears to be relevant and yet, when the answer is given,

the contrary appears. So that should be covered by motion to strike.

Mr. Bronson: Well, I think our question is answered, then. It makes a difference in how much time we are going to take and I thought we ought to bring it up this morning so we would be advised.

The Court: That is right. There is no particular practice, there is no uniformity of practice among the Judges, but, that has been my practice all the time on this [152] bench and also on the Superior Court bench, because 60 per cent of my work in the Superior Court was in a non jury department where the problem of depositions was before me all the time, and we have the same problem here, especially in certain types of cases, like maritime cases, as you know some of them are tried entirely on depositions, and it is very, very rarely that you do not have four or five depositions in an admiralty case, and then, rather than take time we arrange it that way. [153]

I referred when this case came up for trial to what I did in a case that I tried in San Diego where certain depositions were not available, so I kept the case open and they were brought in and I read them and the others prior to the argument. It is merely saving time. It is only when we have a jury that you have to read them, because you cannot give depositions to a jury to take out to the jury room.

Mr. L. B. Stanton: I think, your Honor, coun-

sel addressed himself with regard to whether they would be written objections or oral objections. I believe in both instances we actually referred to the answers rather than to the questions themselves.

The Court: I cannot see how in the course of a trial objections need to be in writing. You have already presented your objections to the interrogatories.

Mr. L. B. Stanton: That is right.

The Court: Your objections to the answers, or motions to strike, of necessity must be oral because they are objections to the contents of the deposition after it has been opened and filed.

Mr. L. B. Stanton: That is correct.

The Court: So I will be glad when the situation develops to take up each of the interrogatories, each group of answers to the interrogatories, and entertain any [154] objections that you have to them before they are in evidence.

Mr. Bronson: All right, your Honor; that makes it clear.

The Court: And that applies to the depositions also.

Mr. Bronson: All right. I think that satisfies it, your Honor.

Would you take the stand again, please, Mr. Whipple?

HAROLD A. WHIPPLE

(Recalled)

Recross-Examination

By Mr. Bronson:

Q. On the redirect examination yesterday, Mr. Whipple, some correspondence between you and the Engraw Company was put in evidence the last thing yesterday afternoon. Is there any other correspondence between you and Engraw from the date, let us say, the 1st of April, 1946, until the 23rd of May, 1946, on the subject of the basis of your activities with them or for them?

A. What were those dates, again, Mr. Bronson?

Q. From April 1st—I think your first letter that was added yesterday was April 3rd, earliest in time—say from that date forward until May 23, 1936, any other correspondence or communications between you bearing on the subject?

A. I am not positive, Mr. Bronson, as to what has been entered in evidence, whether there is anything additional or not. [155]

Mr. Bronson: Can you gentlemen assist on that? The witness says that his memory is not the best on it.

Mr. E. B. Stanton: What were those dates?

Mr. Bronson: April 1st until May 23, 1946.

Mr. E. B. Stanton: Letters bearing on the subject of the relations?

Mr. Bronson: With Engraw; yes.

Mr. E. B. Stanton: You are referring to correspondence from Engraw to Whipple?

(Testimony of Harold A. Whipple.)

Mr. Bronson: And the other direction, too, Whipple to Engraw. I think the term I used was "communications." I did not mean to limit it to letters.

Mr. E. B. Stanton: I don't know whether all these have bearing on this testimony. (Counsel conferring.)

Q. (By Mr. Bronson): I am handing you the Exhibit No. 4 for plaintiff, which is your letter, Mr. Whipple, of May 23, 1946, directed to the attention of Mr. Baglin. You will recall identifying that. After glancing at it do you identify the letter and have it generally in mind? A. Yes.

Q. Was that, in general, the substance of the telephone conversation that you testified you had with Mr. Baglin preceding the dictating of this letter?

A. In substance. There might have been other matters. I don't know. [156]

Q. You say there might have been other matters?

A. Yes.

Q. Leaving out amenities, social amenities and things of that kind, was this the substance of the conversation you had with him on the subject of glucose?

A. As it related to this 1,135 tons, certainly.

Q. You sent that letter, as I understand it, on the date on which it was dictated, the day on which it is dated? A. Yes, sir.

The Court: Mr. Bronson, what exhibit are you talking about?

(Testimony of Harold A. Whipple.)

Mr. Bronson: That is the Plaintiff's Exhibit No. 4.

The Court: May I see it, please?

Mr. Bronson: Yes. If your Honor please, these letters that have been supplied are important to us. We will need a little time to examine them, and before either returning them to counsel or putting them in evidence. So that concludes the examination of Mr. Whipple, with the possibility of our asking to admit these documents last supplied us. If counsel will stipulate that we do not have to identify them by Mr. Whipple, he need not remain in the court room.

Mr. E. B. Stanton: I will so stipulate.

Mr. Bronson: All right, thank you. That concludes the cross-examination.

The Court: Mr. Whipple, you reside here? [157]

The Witness: Yes, sir.

The Court: And you do not contemplate going away in the next few days?

The Witness: No, sir.

The Court: You will be excused with the understanding that if a situation should arise in the next few days and if counsel desires to recall you for any further examination, either side, that you will respond to a telephone call.

The Witness: . Yes, sir; I will do that.

The Court: Of course, they will give you notice enough to get here.

The Witness: Yes, sir.

The Court: All right. Gentlemen, call your next witness.

Mr. E. B. Stanton: If the court please, we are just straightening out the exhibits here.

G. FRED BERGER

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: G. Fred Berger, B-e-r-g-e-r.

The Court: Gentlemen, I notice that this is marked Plaintiff's Exhibit B to a deposition. I do not know whether my attention was called to that at the time it was introduced [158] in evidence or whether you identified it so we would know where it came from. Did we?

Mr. E. B. Stanton: That was Plaintiff's Exhibit what, your Honor?

The Court: Exhibit 4.

Mr. E. B. Stanton: Plaintiff's Exhibit 4.

The Court: Did you take it out of a deposition?

Mr. L. B. Stanton: We took depositions, your Honor, and marked it, and I think we took the depositions of Mr. Donnelly and Mr. Baglin, and in one of those depositions perhaps the document was marked.

The Court: It is marked No. B but it does not show whether it came from the original depositions on file or not.

Mr. Bronson: I can assist you on that, your Honor.

(Testimony of G. Fred Berger.)

The Court: Pardon?

Mr. Bronson: I can assist you on that. It was not attached to the original deposition.

The Court: That is all right. The clerk has to account for the exhibits which are attached to depositions and for that reason I asked the question.

Mr. L. B. Stanton: We just marked that in order to identify it for the purposes of the deposition.

The Court: As long as it did not go into the deposition it is all right. Let us go on. [159]

Direct Examination

By Mr. E. B. Stanton:

Q. Your full name, please?

A. G. Fred Berger; 1272 Arenales, in Buenos Aires.

Q. How long have you been a resident of Buenos Aires? A. About four years.

Q. Are you connected with the plaintiff corporation? A. Yes, sir.

Q. For how long a time?

A. Since its inception in 1944.

Q. Do you hold any position with that corporation? A. I am president of it.

Q. How long have you been president?

A. Since its inception.

Q. When was the plaintiff corporation's inception?

A. I believe the general application for license to operate was filed in August, 1944, and the ac-

(Testimony of G. Fred Berger.)

ceptance was finally granted or the charter was finally granted more or less in March of '45, but operative about August sometime.

Q. Mr. Berger, prior to the inception of this lawsuit have you had any occasion to employ counsel for the corporation?

A. In the Argentine.

Q. Have you had any counsel in the United States?

A. Yes; we had counsel in the United States in February, 1944.

Q. Who was that counsel?

A. Louis B. Stanton.

Q. Prior to your association with plaintiff corporation, can you give the court a resume of your general business experience?

A. Well, I have been in the banking business for approximately 34 years, starting as a youngster in Buffalo, New York and working through various banks in that area, then becoming, out of an appointive civil service list, New York State Bank Examiner for a period of about 10 years, with most of that period spent in New York City and specializing particularly in examining foreign departments of the larger banks and foreign banking corporations operating under Section 25 of the Federal Reserve Act. Those are corporations where national banks are permitted to own shares.

In addition to that I have lectured in the American Institute of Banking, which is an educational

(Testimony of G. Fred Berger.)

section of the American Bankers' Association, for—well, from 1918 more or less to 1938, after which I have been a member of the faculty of the graduate school of banking at Rutgers which is the bank officers' school, for a period of about eight years.

I have also assisted in writing several text books on [161] banking and, of course, all through this period I have been lecturing on the subject of banking as well. I think that would—oh, in 1924 I spent a year with Lybrand, Ross Bros. and Montgomery as their bank system and bank analyst specialist, and after that, operated or helped to operate a bank in Norristown, Pennsylvania known as the Norristown Penn Trust Company, during which time I was active in both the Pennsylvania Bankers' Association and the American Bankers' Association, particularly having to do with the bank management commission of the American Bankers' Association and several other commissions, and being chairman practically throughout that period of the so-called committee on bank management problems of the Pennsylvania Bankers' Association.

I think that about does it. [162]

Q. (By Mr. E. B. Stanton): In the course of your banking experience, have you had occasion to deal with and become familiar with procedures concerning the issuance of letters of credit in foreign transactions? A. Yes, sir.

Q. Are you conversant with the Spanish language, Mr. Berger?

(Testimony of G. Fred Berger.)

A. Well, I can read it and understand it much better than I can speak it, but I can speak it sufficiently well so I don't get lost in Buenos Aires or Montevideo.

Q. Now, you spoke of the plaintiff corporation having operated several years. Can you tell us, what is the nature of their business in general?

A. Well, it is both export and import. We purchase very largely greasy wool in the Argentine and ship that to the United States. We are working on other products, also, to ship from the Argentine and from Montevideo, Uruguay and, later, now, Brazil, into the United States, in order to offset the dollar exchange program which is now the subject of so much difficulty.

So far as imports into the Argentine and Uruguay are concerned, we represent a very large number of organizations, such as Atlas Diesel Engine Corporation in Oakland, California, Higgins, Incorporated, the boat builder in New Orleans, Butler Manufacturing Company in Kansas City, Richmond, [163] California, Minneapolis and Galesburg, Illinois, on the question of grain tanks, grain elevators, et cetera, et cetera and et cetera.

Q. Do you know the witness Harold Whipple?

A. Yes, sir.

Q. How long have you known him?

A. Since May, 1945.

Q. Have you since that time had any business relations or dealings with Mr. Whipple?

(Testimony of G. Fred Berger.)

A. Our relations dealt with correspondence looking toward the possibility of export or import of articles out of the United States to the Argentine and from the Argentine into the United States.

Q. And over what period of time did these negotiations and transactions take place?

A. Well, from May, 1945, when I was here, to May—June, 1946 when the situation which we are discussing now came to a head.

Q. Do you know the defendant corporation, the Schenley Distillers, know of them?

A. Yes, sir.

Q. Did your firm or did you ever purchase any glucose in the Argentine during 1946 to the account of Schenley Distillers? A. Yes, sir. [164]

Q. Now, when, and how much did you purchase?

A. We purchased a total of 1,535 tons, on various contracts running from in the latter part of May—the dates I don't recall offhand—starting about the 22nd of May or the 23rd of May.

Q. Did you purchase this 1,535 tons all at once?

A. No. We purchased 1,535 tons. Well, we first talked of 600 tons and finally purchased 1,135 tons and then later added an additional 400 tons as a separate transaction.

Q. Well, when did you make your first purchase; at or about what time did you make your first purchase of 600 tons, if you recall?

A. That purchase was made upon the receipt of a final confirming cable which must have reached us

(Testimony of G. Fred Berger.)

on the 22nd of May, because I believe that is the date of the first actual purchase, actual signing of a contract.

Mr. E. B. Stanton: Will counsel stipulate that Mr. Berger sent all these cables or received the cables which are directed to his attention, without having him identify each one?

Mr. Bronson: That is all right, and if you will tell us what number it is, so we can refer to it in the transcript.

Q. (By Mr. E. B. Stanton): Now, Mr. Berger, I am going to show you what is designated as Defendant's Exhibit B, ask [165] you to examine it and see if that coincides with your recollection as to the date of the 600-ton transaction? (Mr. E. B. Stanton hands document to the witness.)

A. That is right. That was subject to prior sale on the 21st, so we were waiting to hear from Mr. Whipple.

Q. And thereafter you purchased up to a total of 1135 tons? A. That is right.

Q. Now, prior to that date, have you had occasion to make any particular study of the glucose market in the Argentine or in South America?

A. At that time we were just inaugurating a study of the whole market for the simple reason that we, as I have stated earlier in my testimony, were working with Mr. Whipple toward the establishment of a continuing market for glucose. Our arrangement for the marketing of the product,

(Testimony of G. Fred Berger.)

one of the manufacturers in the Argentine, and Mr. Whipple and any other agent who was on the Coast, for instance, Mr. Whipple on the west, that was all in the process of working—of evolvement so that a continuing market could be arranged, contracts could be projected and the whole thing gradually evolve into what we call bread and butter accounts, accounts that continue all the time and from the commission of which our general overhead is paid.

Q. Mr. Berger, in making a study of the market [166] conditions relative to glucose (I have reference to price in that regard), what investigation did you make?

A. Well, naturally, like my earlier statement as to what we were doing, it has to more or less provide or lay the groundwork for what I want to say now, and that is that as a part of that study we naturally ascertained the general price levels, through our broker who handled that particular type of transaction or who would have handled it if we had evolved our original plan, and who later handled our transactions or the majority of them in the United States, of our purchases for Schenley and in that study the question of fluctuating prices would naturally have come under careful consideration.

Then, when this particular program rather speeded up our study so that we had to take the steps rather quickly to ascertain all of the detail

(Testimony of G. Fred Berger.)

in connection with the market, particularly as the market was fluctuating rapidly and we had to put ourselves in a position where we could act as quickly as possible, after we knew definitely what was wanted——

Q. (By Mr. E. B. Stanton): Mr. Berger, can you tell us the glucose situation in the Argentine? Are there many manufacturers or few, or what is the situation?

A. Actually, there are only two manufacturers of glucose.

Q. You are speaking now of the basic manufacturers?

A. Of basic manufacturers of glucose, there are only [167] two, and one of those is tied up with a company in the United States, so that, to all extents and purposes, for a general market, there is only one.

Q. Now, as a practical purpose, what happens to the products manufactured by this one or the two manufacturers, do they sell and direct or what do they do?

A. Well, up to now, they have been selling to various buyers, in other words, middle men. Our program was to have eliminated at least a part of those middle men and have dealt directly from the manufacturer, through our agent in the United States, with the purchasers themselves.

Q. Were you successful in that arrangement?

A. Well, we have——

(Testimony of G. Fred Berger.)

Mr. Bronson: I think, your Honor, unless there is some showing of what the purpose of this is, that it does not connect up with the complaint and causes of action here. I can't get it. We object on the grounds it is incompetent.

The Court: Well, I think preliminary inquiry is justified but not to the extent which this inquiry presages.

Mr. E. B. Stanton: Well, if your Honor is satisfied yourself, up to date, so far as the witness has gone, if he has given a sufficient groundwork on the glucose market——

The Court: Well, I am not passing any judgment as to your qualifying him as an expert.

Mr. E. B. Stanton: That is correct. [168]

The Court: I mean that relates to his experience in the case, but we are not interested in the Argentine commerce at all or the manner in which they conduct things there. We are interested merely in the particular transaction and any testimony that this gentleman is going to give as an expert should be based on his knowledge of the market, but all the relationship between a particular concern or with the consumers in the United States or that are not in the United States is foreign to the inquiry in which we are interested.

Q. (By Mr. E. B. Stanton): Mr. Berger, at or about the period from the 20th of May to say the 24th of May, based on your study and inquiries which you made at that time, what was the struc-

(Testimony of G. Fred Berger.)

ture of the glucose market from the standpoint of was it steady or was it fluctuating?

A. It was fluctuating quite rapidly, rather from the 1st of May to the period that you mentioned, the 23rd of May.

Q. Can you give us any idea what that change of fluctuation was?

A. Yes. I recall around the 1st of May the glucose was selling at about 1.10 a kilo, that is a peso, 1.10 a kilo and it gradually advanced to 1.20 a kilo during the month.

The Court: Is that a product of sugar?

A. Corn. [169]

Q. Glucose is made out of corn?

A. This glucose. They do make it out of beet sugar, but this particular glucose was made out of corn.

Q. (By Mr. E. B. Stanton): Was there any standard on the glucose manufactured in the Argentine, that you know of?

A. Well, the requirement is that the glucose manufacturer must use the U.S.P. standard of Baume 43-45.

Q. You stated that you purchased some glucose for the defendant, Schenley Distillers. From whom did you purchase this total I believe you mentioned, of 1,535 tons over a period of time?

A. Well, I can tell from whom. I can't tell how much,

From S.I.F.A.R., from R. H. Gonzalez & Cia,

(Testimony of G. Fred Berger.)

from Auge Freres, and from Eugenio Lang; and there is one other whose name I can't remember.

"Intercont" is the other one.

The Court: Auge is the Spanish name for Brothers.

The Witness: For Brothers.

Q. (By Mr. E. B. Stanton): Mr. Berger, I show you some photostatic copies of some documents and ask you if you can identify these and tell us what they are? If there are any duplications there, I just want one of each.

A. These are contracts for the purchase of glucose. How much detail do you want?

Q. Are these the contracts that you are speaking of [170] with the suppliers that you mentioned? Would you examine them and pick out one for each supplier? If there are any duplications, put them in their proper fashion.

The Witness: S.I.F.A.R. is 1000 tons.

Mr. E. B. Stanton: Just lay the S.I.F.A.R. one aside.

The Witness: R. H. Gonzalez——

Mr. E. B. Stanton: Is this a duplicate of this?

The Witness: No. There are two contracts.

R. H. Gonzalez & Company, 200 tons; Auge Freres & Company, 75 tons; Eugenio Lang, S.R.L., which means limited, 50 tons; Francisco J. Pedmonte, 60 tons; and "Intercont," 150 tons, in two contracts.

Mr. E. B. Stanton: Do you know where the originals of these documents are?

(Testimony of G. Fred Berger.)

A. Yes, the originals of the documents are filed with the Livestock Exchange in the Argentine, in Buenos Aires, because those forms are written on Stock Exchange forms.

Q. Are the originals of these documents available to you?

A. No, except to look at. But, they are filed definitely with the records in the Stock Exchange.

Q. Are these the only copies that you have of those documents?

A. Yes, sir.

Mr. E. B. Stanton: I ask that these be introduced in [171] evidence as a group exhibit, as Plaintiff's exhibit next in order.

The Court: Let me see them.

Mr. E. B. Stanton: Those are not individually translated, your Honor.

The Court: Do you want them as one exhibit?

Q. (By Mr. E. B. Stanton): That is a total of 1,535, is it, Mr. Berger?

A. Yes, that is right. That is the total of 1,535 tons.

Q. Was it a thousand from S.I.F.A.R.?

A. Yes. There are 400 and 200. The 400 S.I.F.A.R. is the extra 400 added to the 1,135.

Mr. E. B. Stanton: I would suggest one group exhibit, your Honor.

The Court: Well, I think if you do that, we will mark them, give them A, B, C and D—give them one number and then identify each as it is referred to. This is a tax stamp, Impuesto.

(Testimony of G. Fred Berger.)

The Witness: You are thinking of a warehouse receipt there. This is merely a *contracto*.

The Court: No. I mean this paper is a stamped paper, a paper on which you pay a tax.

The Witness: No, I don't think it is on the exchange. This is not on stamped paper. That is on stock exchange [172] form.

Mr. E. B. Stanton: Perhaps we might have the witness identify this group exhibit, A, B and C—and give the contents, the names of the companies, for each one.

The Court: You see, it is a form that went through the Chamber of Commerce at Buenos Aires.

The Witness: That is Stock Exchange.

The Court: Is that a stock exchange?

The Witness: That is a stock exchange.

The Court: All right.

The Clerk: Are these admitted, your Honor.

The Court: They may be received as one exhibit.

The Clerk: This is Plaintiff's Exhibit 21, 21-A, 21-B, 21-C, 21-D, 21-E, 21-F, 21-G, in evidence.

Q. (By Mr. E. B. Stanton): Now, prior to the signing of these contracts, Mr. Berger, did you make any investigation concerning the export situation in Argentine? A. Yes, sir.

Q. When?

A. I would say over a period of at least a month prior to the time of the development of this parti-

(Testimony of G. Fred Berger.)

cular business, because as I testified earlier—it could have been more than a month because there was a good deal of study made in it—we were evolving or attempting to evolve a program with Mr. Whipple, in connection with this general export of [173] glucose, so that we were studying the market at the time, and then when this purchase—or when we started exchanging these cables and letters with regard to something specific, we then made a specific study of the procedure so that we would be in a position to act as soon as it would become necessary.

Q. (By Mr. E. B. Stanton): What did you learn as a result of this investigation or study concerning the export arrangements in the Argentine?

Mr. Bronson: I am going to object to that, as hearsay, if your Honor please.

Mr. E. B. Stanton: If the witness is familiar with the requirements of export at that time, I think it is rather essential to the case.

Mr. Bronson: It may be essential to the case. The objection is to the way you are going about getting it in the record.

Mr. E. B. Stanton: Well, the witness is in the import-export business. He is bound to be familiar with it.

The Court: I don't know what you are trying to prove, whether you are trying to prove a regulation——

Mr. E. B. Stanton: No.

(Testimony of G. Fred Berger.)

The Court: ——with reference to which the witness would not be qualified, or whether you are trying to prove a custom of trade. I can't tell by the question. [174]

Mr. E. B. Stanton: I am endeavoring to get to the point of the fact that he complied with the requirements in existence at that time for procuring of an export license, which was done.

The Court: Well, the main point, then—then the question of requirement is not a proper subject of examination, but the question is what he did. You may ask him what he did.

Mr. E. B. Stanton: All right.

The Court: In order to start this deal in motion.

Q. (By Mr. E. B. Stanton): What did you do, Mr. Berger, with reference to securing of an export permit?

A. We ascertained that it was necessary to make an application to the Department of Commerce and Industry and more specifically to the subdepartment in that ministry having the export licenses in control, and we were advised that one the application had been——

Mr. Bronson: May I interrupt just a minute. As to what you were advised, I object to it as hearsay.

The Court: Well, I will allow the answer to remain, except the last paragraph, "We were advised——"

I think while you are examining that, we will take a short recess, gentlemen.

(Testimony of G. Fred Berger.)

(Whereupon a short recess was taken.) [175]

The Court: All right, proceed.

Q. By Mr. E. B. Stanton): Mr. Berger, did you make an investigation as to the requirements necessary to secure an export permit in May, 1946?

A. Yes, sir.

Q. And did you learn what those necessary steps were? A. Yes, sir.

Q. Will you now relate to the court the steps necessary to secure an export permit from the Argentine to the United States in May, 1946?

Mr. Bronson: We will object to that on the grounds, if your Honor please, that it calls for hearsay.

The Court: Well, to some extent any testimony about the permit would have to be hearsay as far as the defendant is concerned, but it is one of those cases which, of necessity, must be outside of the hearsay rule. In other words, there is no way to show, no matter who testified it would be hearsay so far as you are concerned. If you got the Government official who issued the permit to testify it would still be hearsay.

In other words, so long as there is a requirement, so long as you have insisted not only that it was necessary, but with a condition precedent stated at various times during the course of the various motions, a condition [176] precedent to see that a proper permit existed, then the granting of the permit therefore becomes a material subject of in-

(Testimony of G. Fred Berger.)

quiry. But all of it would of necessity be hearsay because it is not anything which relates to the defendant.

From another standpoint, however, it is this: Assuming that there is a contract and Engraw is required to not only purchase the glucose but also deliver it to certain carriers for transportation, then to the extent of making those arrangements and making them available, he becomes your agent so far as securing the proper permits which are necessary before he can deliver them to an agent or make an agent available for the purpose of exporting it out of the country. It is just the same as if, for instance, you were dealing in, say, an interstate contract and the order was f.o.b. Suppose it was relating to oranges or citrus fruits from Arizona to California, we know that a state has certain quarantine laws and certain inspection. While ordinarily these inspections take place at certain places—I forget, but I think it is Yerma as far as California is concerned, California and Nevada—it is common knowledge in the case of persons transporting foreign products into California which are subject to quarantine or inspection the state will arrange to have an inspection made before the border is reached and give the person a release. I myself have seen that done, coming from Nevada into California. [177]

Now, all that is hearsay so far as the buyer is

(Testimony of G. Fred Berger.)

concerned, but it could not be argued that in such a case the seller could not testify that he had complied with these matters and secured the permit.

I will overrule the objection. Besides, I call attention to this fact, gentlemen: That since the new rules have been in vogue, so far as I know no civil case has been reversed for violation of a rule of evidence such as the hearsay rule, because the Rule says that, while you are following the rules of evidence of the state where the court sits, it also says that we should decide questions in favor of admissibility or, rather, should follow the rules which favor admissibility rather than exclusion. So that in effect, my view of it is, which I have expressed repeatedly, that we are in the same position as the equity courts were before; that it was left to our good judgment to say what testimony shall be admitted.

I admit, for instance, that an entire case based upon hearsay and the like, and contained a flagrant disregard of some of the fundamentals of the principles, it would not have much of a chance of being sustained, but the incidental violation of one of the rules where no other proof is available because of various situations, it has never been made the basis of a reversal that I know of since the rules went into effect, and I have been on the bench ever since [178] they went into effect. I wrote a book on them, explaining them, and I have given a lecture in San

(Testimony of G. Fred Berger.)

Francisco to the Stanford Law Society, explaining the whole book of rules in two hours. It was quite an attempt to cover a lot of territory even in two hours.

Mr. Bronson: Of course your Honor is aware of the fact that the question was, first, whether he made an investigation and what developed.

The Court: To find out what was necessary. In other words, he is laying foundation for the requirements and then, of course, that will be followed by inquiry as to how the requirements were complied with.

Mr. Bronson: I would not have made objection, I take it, if he had asked him what are the requirements, without going into various types of information.

The Court: We will go back to the question.

The Witness: Would you give me the question again, please?

(Question read by the reporter as follows:

“Q. Will you now relate to the court the steps necessary to secure an export permit from the Argentine to the United States in May, 1946?”)

A. When the contracts are signed——

Mr. Bronson: Will you speak a little louder, please? It is hard to hear you. [179]

A. When the contracts are signed, and particularly if they are on stock exchange forms, as ours are, we being a member of the exchange, they

(Testimony of G. Fred Berger.)

must be registered at the stock exchange, after which, the contracts having been registered, an application must be filed, application for an export permit must be filed with the department, the subdivision of the Department of Commerce and Industry, the ministry of commerce and industry, which application is immediately considered. And then within three or four days after the application—three if you are in a hurry and four if you are not, or longer if you are not—you proceed with the required tax and pay the tax and obtain the necessary receipt for the tax and also the export permit.

Q. (By Mr. E. B. Stanton): You say with reference to this tax three or four days if you are in a hurry. Is there any time within which you must pay the tax that you know of?

A. No. It is more or less up to you. If you are in a hurry, they advise that it takes about three days to process the application through the normal routine.

Q. You mean after the tax is paid there is a lapse of three or four days before you get it?

A. Oh, no. You don't pay your tax until you are ready to get your permit.

Q. I see.

A. In other words, the first three days, a minimum of [180] three days would be required for processing the application through the various department sections, and then if you want your per-

(Testimony of G. Fred Berger.)

mit immediately, you immediately go and pay your tax. The initiative is up to you. If you are not in a hurry, you wait and you can get it any time, and then the department might call you eventually and say, "Well, what about this application for an export permit? What are you doing about it?"

Q. Were export permits for glucose to the United States being granted in the Argentine in May, 1946?

Mr. Bronson: I object to that as irrelevant, incompetent and immaterial, not the best evidence.

The Court: To that question I will sustain the objection. I think the question is not whether they were being granted or not, but whether this was granted. The objection will be sustained.

Q. (By Mr. E. B. Stanton): Now, Mr. Berger, what steps did you take in May, 1946, if any, towards the procuring of an export permit for glucose to the United States?

A. When the contracts were signed we immediately registered them at the—I say "immediately"—within the usual period of a day or so, sometimes the same day, registered them at the stock exchange and then immediately took steps to file our application with the department of commerce and industry. [181]

Q. Mr. Berger, I show you three documents and ask you if you can identify what these are?

A. Yes, sir.

Q. What are they?

(Testimony of G. Fred Berger.)

A. These are copies of the applications for permission to export.

Q. Calling your attention to this copy which you have identified as a copy of a petition to export, bearing the number 192,468, is that a copy of the application which your company filed for an export permit? A. Yes, sir.

Q. And what date did you file that?

A. On the 27th of May, 1946.

Q. Now, do you know where the original of that document is?

A. Yes; in the Department of the Secretary of Industry and Commerce, in the Department of Exportation and Importation.

Mr. Bronson: We can't hear the witness. He talks too low.

Mr. E. B. Stanton: Would you repeat that answer, please, Mr. Reporter?

The Witness: Yes.

Mr. E. B. Stanton: Let the reporter read it.

(Answer read by the reporter.) [182]

Q. How much glucose is covered by that particular application, Mr. Berger? A. 935 tons.

Mr. E. B. Stanton: I will ask that that be introduced into evidence as Plaintiff's next exhibit.

The Clerk: Admitted, your Honor?

The Court: It may be received.

The Clerk: That is PLAINTIFF'S EXHIBIT 22 in evidence.

Q. (By Mr. E. B. Stanton): I hand you these

(Testimony of G. Fred Berger.)

two remaining copies and ask you what date you filed those? A. On July 4, 1946.

Q. And what are the amounts borne by each one?

A. No. 202,501 covers 200 tons and No. 202,502 covers 400 tons.

Q. You followed the same procedure which you have related in filing these two? A. Yes, sir.

Q. And the originals are in the same place?

A. Yes, sir.

Mr. E. B. Stanton: I ask that these be introduced as a group Plaintiff's exhibit next in order.

The Court: All right, they may be received.

The Clerk: PLAINTIFF'S EXHIBIT 23 in evidence.

Q. (By Mr. E. B. Stanton): Now referring to the application designated as Plaintiff's Exhibit 22 which you [183] have testified you filed on the 27th of May, 1946, following the filing of this document did you receive any communications from the Department?

A. Yes. We received a communication from the Department asking us for manufacturer's certificates.

Q. I show you this document bearing the date "Buenos Aires, May 29, 1946," signed "Miguel Angel Ripa Alsina," which signature is stamped on the document, and ask you if you can identify that? A. Yes, sir.

Q. What is that document?

(Testimony of G. Fred Berger.)

A. That is a letter which the Department wrote to us requesting us to file the necessary manufacturer's certificates which we had originally failed to file with the application.

Mr. E. B. Stanton: I note for the record that this document is in Spanish. I think counsel on all sides have seen it and read it.

The Court: I think, gentlemen, that we ought to put into the record, not exactly a translation, but a summary of the contents, and also in English. You may have those contracts if you want them.

Mr. E. B. Stanton: All right.

The Court: I will be very glad to do it.

Mr. E. B. Stanton: This is the first exhibit, your [184] Honor.

The Court: Which number is that?

Mr. Bronson: That would apply likewise to their exhibit 21.

The Court: I am coming to that.

This is a group of original contracts which recites the purchase and sale of a certain quantity of glucose. In a box at the top of each of the contracts appears a summary of the parties, the merchandise involved and the money value. The first item is the seller, the vendor, S.I.F.A.R.

Mr. L. B. Stanton: Excuse me, your Honor, that is more or less a translation.

The Court: Have you a translation?

Mr. L. B. Stanton: That is a translation of one of the documents.

The Court: I will give that one and then I will

(Testimony of G. Fred Berger.)

introduce this for the balance, because you do not have the top there. You do not have what I am reading.

Mr. L. B. Stanton: No; I do not have that top.

The Court: Then the next item is "Comprador" which is the purchaser, Compania Engraw S. R. L.

The Witness: This is a request until October.

The Court: "Plazo Operacion hasta oct." Until October; that is right. A total of imports, in the same line, [185] \$480,000. There is a dollar mark.

"Especie", coin; liquid glucose, tax \$48.25; quantity 400 tons. The price, \$1.200; Pesos/ton, then carried over—is that excise tax, "Derecho"?

The Witness: No. Let me see how that is done.

The Court: "Derecho" would mean a right.

Mr. Berger: It is a form of tax.

The Court: "\$24.15." Then commission $\frac{1}{2}$ per cent; total \$72.40. Alongside of it is a stamp which reads "Bolsa de Comercio de Bs. As."; that is the stock exchange of Buenos Aires.

This is the tax stamp "Impuesto". National Office of Stamps, authorized No. 54, 29th of May, 1946.

The Witness: This is the whole stamp, your Honor, is merely a stamp showing the date on which——

The Court: It says official stamp. It is like a permit. It is something like our stamp permit where, instead of using stamps, you use a stamping machine, and that gives the tax \$48.25.

(Testimony of G. Fred Berger.)

Now, the text is substantially as shown by the translation.

Mr. L. B. Stanton: It varies some, your Honor, in each one. I made that as a sample. I do not think as far as this case is concerned the variations make any difference.

The Court: All right. Then the English translation [186] is given as a typical form, varying in quantities and the like, and all of them bearing the legend I have indicated, except different sellers, different amounts, and the same stamp, also, with different amounts.

Mr. E. B. Stanton: May I suggest, as long as your Honor has referred to the translation, that that translation be attached?

The Court: Be attached, that is correct. I was going to do that. The translation will be attached.

(Copy of translation of Plaintiff's Exhibit 21, 21-A, 21-B, 21-C, 21-D, 21-E, 21-F, 21-G with the exception of the top portions and variations heretofore noted by counsel.)

"Chamber of Commerce of Buenos Aires

"General receipt of purchase and sale issued in accordance with article 32 of Decree number 9432. Exclusive for goods not comprised in the series of bulletins of the Chamber of Commerce and merchant members of the Chamber of Commerce of Buenos Aires.

"S.I.F.A.R. Sociedad Anonima Reconquista 379 Buenos Aires sells to the gentlemen Compania En-

(Testimony of G. Fred Berger.)

graw S. R. L. San Martin 329 Buenos Aires through the agency of Mr. Mario Polastri-Corrientes 456 Buenos Aires the following:

“4,000 kilograms of maize glucose liquid crystal [187] concentration (43/45°) baume U.S.P. current produce of S. A. Juan B. Pezza, Ltd. packed in new wooden casks eight sunchos proper for exportation of approximately 300 kilos of net contents at the price of 1,200 pesos per 1000 kilos net weight, without casks placed at the side of the steamer in the port of Buenos Aires as ordered by the purchasers. Thereby acts of God, strikes in the shops of producers or lack of motive power in the producers such as may be subject to approval, the time of delivery will be extended as many days as such as the moving effect of the act of God lasts. The delivery will be made in the months of July, August, September and October of 1946 at the rate of 100 metric tons each time and each month. The weight will be taken in accordance with the original scale weights of the manufacturers. The purchasers will open not later than the 5th of June, 1946 and irrevocable credit in favor of the sellers confirmed of the First National Bank of Boston at 99 Florida Street, Buenos Aires. Payment will be made in Buenos Aires by drafts against presentation and delivery of bill of sale accompanied in each case by receipt executed by the receiver for purchasers. The credit must expressly stipulate [188] with the merchandise shall not have been received within

(Testimony of G. Fred Berger.)

the established period the invoice of the sales will be paid on the last day of each period. Against the invoices of the sellers accompanied by receipt (warehouse receipt) of deposit of the Catalinas or others duly endorsed by the sellers in favor of the purchasers. The seller will immediately procure for the purchase a letter of production of the merchandise for the purpose of exportation.

“The total value of the merchandise in possession is \$482,400.00 for the purpose of the stamps attached.

“If parties are subject to the regulations established by the Chamber of Commerce of Buenos Aires every question which may arise between the parties will be settled in accordance with that stipulated in the articles pertaining to the statute of the Chamber of Commerce of Buenos Aires for the legal purpose the parties place their special domicile of that of the Secretary of the Chamber of Commerce of Buenos Aires 299 Sarmiento State Federal Capital where citations commands and resolutions will be delivered. The parties sign the present ticket in duplicate of the same tenor and with the singular effect. [189]

(Testimony of G. Fred Berger.)

“Buenos Aires—29th day of May, 1946

Interlined purchasers letter of production of the merchandise for purpose of exportation.

SOCIEDAD INDUSTRIAL FINANCIERA
ARGENTINA

S.I.F.A.R.

Sociedad Anonima

COMPANIA ENGRAW INDUSTRIAL
COMMERCIA S. A.

“The ticket bears at the side number 478463A, bears at the top to be filled in by the contracting parties for the office original.

“Sale S.I.A.F.A.R. Soc. Anon. Purchaser Cis. Engraw S.R.L.

term of operation up to October. Total sale \$482,400.00.

Natural liquid glucose tax \$48.25 quantity 400 metric tons. Price 1.200-p/ton Tax \$24.15 Commission $1\frac{1}{2}\%$ Total \$72.40.

Stamp Chamber of Commerce of Buenos Aires impost of stamps of the authorization No. 64. 29th of May, 1946. Tax \$48.25. The above is a sample translation of the order.”

The Court: 22 is an official form and bears the seal of the Republic of Argentina and the office of industry and commerce. General direction of external commerce, direction office of export and import.

And then it reads *Solicitud De Permiso De Exportation*, it's on application for permission to export, and then it gives the name of the applicant

(Testimony of G. Fred Berger.)

company, Engraw, and so forth, with Domicile office at (2) Calle San Martin, street and number 345; City, Capital, Buenos Aires; Province or territory is blank. No. 2514. And then there is a place marked for revenue stamps, Estampillas Fiscales; Destination, on the I is given; destination, United States of America. Customs House of Departure, Federal Capital.

II.—Articulos Que Solicita Exportar:

Articles of merchandise we desire to export. On the side, in one column is given quantity in net kilos, 935,000.

Then a description is given for corn glucose, liquid crystallized, in wooden barrels. Industria Argentina, showing it is of Argentine manufacture, and in the last column on the right is the value, F.O.B., and it says 1,215,500.—I presume that is in their pesos. That is pesos.

Then, carried below is the amount, 935,000 and the value 1.215.500 pesos.

The remainder of the blank is not filled in, and across the top part, center and bottom parts, across the face of the instrument are three stamps, each marked Copia, which is copy.

I have read the front part of the exhibit, except the number which appears on the extreme right top in red ink, [191] one number, export number 192468.

The reverse of the exhibit which constitutes portions marked in Romans III and IV are not signed.

(Testimony of G. Fred Berger.)

Below that is a statement which reads in substance:

“I request that the Director of Exports authorize the name of the firm to export the merchandise which I have specified in the present document as to which I declared under oath, in conformity with the provisions of law No. 12, 591 that the information therein set forth is a true reflection of truth.” That is your purple patch in Spanish language. The portion is printed and there is typed “Buenos Aires,” the 27th of May, 1946, and a place for seal and signature.

Gentlemen, have I translated those for the record, to your satisfaction?

Mr. E. B. Stanton: Excellently.

Mr. Bronson: All right, your Honor.

The Court: All right.

Exhibit No. 23 is on the same form. It consists of a copy and a duplicate, a duplicate copy.

The Witness: That is not a duplicate.

The Court: What is that?

The Witness: That is a second application.

The Court: A second application?

The Witness: It happens to be a second application.

The Court: It says duplicate copy. [192]

The Witness: They are all duplicates.

Mr. E. B. Stanton: They are all duplicates, of originals which are on file.

The Court: This is a different one.

(Testimony of G. Fred Berger.)

Exhibit 23 consists of two, which are on the same form, and the first one has the number 202501. The applicant is the same company. The domicile is the same, and the destination is given as the same. The merchandise is the same. The quantity is different, 200,000 net kilos, and value 260,000 pesos. This one contains, under Subdivision III the name of the manufacturer, S. A. Juan B. Pezza Ltd., I presume it means Limited, and the residence, place of residence is given as Oncativo 815 (Cordobe).

Under Miscellaneous there is added the following legend, inserted in typewriting: Accompanying the present averment is a certificate or proofs of the sale according to export Number 192.468/46. That is a copy of the telegram.

The next exhibit, which is blue-green, is shown on a similar paper except that it has a stamp that it is a duplicate. The date of the execution of the instrument is the 4th of July, 1946, at Buenos Aires and the place is given as at Buenos Aires.

The next one is on the form which is identical except it is marked duplicate in Spanish. It gives the name of the applicant as Cia Engraw, giving its place of business as the [193] same; exportation destination, United States of America. The merchandise is the same. The quantity is 400,000 kilos and the value 528,000 pesos.

The name of the manufacturer under subdivision III is given as S. A. Juan B. Pezza, Limited, and the address is the same.

(Testimony of G. Fred Berger.)

Under Miscellaneous, there is added, "Attached here are two certificates," detailed certificates, certificates of correspondence and a copy of the telegram, corroborative of the sale made, and this is dated July 4th, 1946, at Buenos Aires.

All right.

Q. (By Mr. E. B. Stanton): Now, Mr. Berger, I call your attention to the space for signature on the reverse side of Plaintiff's Exhibit No. 22. Do you recall whether or not you signed the original document which was filed?

A. It was either my signature or Captain Andres del Borgia, our vice president, either one of us would sign.

Q. Now, Captain Andres del Borgia, that you have spoken of as your vice president, what are his duties in the organization?

A. Well, he is also import manager. His duties in the organization are the same—his designated duties in our organization are when I am away, just the same as are mine, with certain limitations, within certain limitations, and other than that, he operates as import manager. [194]

Q. Is that under your direction and control?

A. Entirely under my direction and control.

Q. You supervise his activities, then?

A. Yes, sir.

Mr. E. B. Stanton: You have identified this letter of May 29th. I believe I will introduce this in evidence and ask the Court to read into the record the translation of that record.

(Testimony of G. Fred Berger.)

The Court: All right.

The Clerk: Plaintiff's Exhibit 24 in evidence.

The Court: All right. This is a letter on the stationery of the Secretary of Industry and Commerce, the Republic of Argentine, Director General of Export and the Office of Export.

General Manager, Company Engraw, and so forth, giving the address.

Please refer to Chemical Products Export Numbers 192.468-46.

I better read this first, before I translate it into English. (Reading)

We call your attention to the fact that in order to act on your request relating to the above export, it is necessary to transmit to this office certificate of the manufacturer stating the quantity of glucose about to be exported.

At the same time, we are pleased to inform you that [195] within 24 hours from this date if we do not receive the document necessary, your request will be abandoned and it will be deposited in the archives of this office.

Yours sincerely,

Signed Miguel Angel Ripa Alsini,

Head of the Division of

Permits for Export.

And the seal of the Secretaria or the Office of Industry and Commerce of the Argentine Republic and of the Office of Export.

That is all.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: Thank you.

Q. Did you comply with the request of that letter, Mr. Berger? A. Yes, sir.

Q. I show you a carbon copy purporting to be a carbon copy, bearing date May 30, 1946, bearing the typed signature of Andres del Borgia, and ask if you can identify that? A. Yes, sir.

Q. From where was that paper produced, do you know?

A. This paper is a copy of the letter that we wrote to the Director General of the External Commerce.

Q. Where did you procure that copy?

A. In our office.

Q. As part of your office files?

A. As part of our office files, yes, sir. [196]

Q. This is the reply, then, to the letter which the Court has just read into the record?

A. That is correct.

Q. And I note that it bears a designation at the bottom. What does that designate?

A. That enclosure was No. 16, "certificados de elaboracion," which means certificate of manufacture.

Q. Do you know whether or not that was used, enclosed and sent to the Department?

A. Yes, I do.

Mr. E. B. Stanton: We ask that this be next introduced in evidence.

The Court: All right.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: And we ask that the Court read it.

The Clerk: That is Plaintiff's Exhibit 25, in evidence.

The Court: This is a copy of a letter dated May 30, 1946, bearing the address, new address of the defendant, and the telephone number, addressed to the Office of Secretaria of Industry and Commerce, General Director, External Commerce, to the Chief of Division of Export, Miguel Angel Ripa Alsina, re Chemical Products No. 192.468-46.

Acknowledging receipt of your letter of the 29th instant in which you inform us that in order to act on the request for export above referred to, it is necessary to transmit to your office certificates of the manufacturer, giving the [197] quantity of corn glucose about to be exported.

In compliance with the regulations, we are pleased to transmit to you this day the required documents.

And then even a more flowering "Yours truly," Cia. Engraw, and so forth, by Andres Del Borgia, the manager of the Import Division.

At the bottom is shown "Attached No. 16 Certificates of Manufacture."

Mr. E. B. Stanton: Thank you, your Honor.

The Court: Yes.

Mr. E. B. Stanton: If I may suggest, I have only about half completed my examination.

The Court: I was waiting for a good place to stop. Is it a good place now?

Mr. E. B. Stanton: This is the spot.

The Court: All right, 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day.) [198]

Los Angeles, California, Wednesday, June 2, 1948,
2:00 p.m.

G. FRED BERGER (Recalled)

Direct Examination (Resumed)

By Mr. E. B. Stanton:

The Court: All right, proceed.

Q. Mr. Berger, you testified, I believe, that your steps and procedure towards procurement of a license for export at that time were to first register your permits and contract, secondly, to make your application, and then you mentioned the payment of the tax. Following the communications that you sent to the Department on May the 30th did you thereafter pay the tax on any of these shipments?

A. No, sir; not until, finally, later in the year, but not at the time.

Q. I show you Plaintiff's Exhibit 5 and ask you if you have seen this document or a copy thereof before?

A. Yes, sir; I have seen it.

Q. When did you first see such a document?

A. Well, it reached us, I believe, in a letter dated June the 6th from Mr. Whipple, possibly June the 10th or 11th.

Q. I note in that "P.S." on this document:

(Testimony of G. Fred Berger.)

“Shipping schedule as follows,” now quoting from the document: “June—50 tons; July—60 tons; August-September—200 tons; [199] September—150; October—275; November—200; December—200.” Was there at any time any correspondence or agreement between you, Mr. Whipple, or Mr. Whipple and yourself and the Schenley Distillers pertaining to the time in the month of the June delivery?

Mr. Bronson: We will object to that. It calls for a conclusion. He is asking for an agreement, your Honor, as I understood it.

Mr. E. B. Stanton: Well, I will strike the word “agreement” and I will limit it merely to ask:

Q. Was there any correspondence or terms contained any place that you know of tying that down to the particular date in June when you were to make that delivery.

Mr. Bronson: The same objection, calls for a conclusion, incompetent and irrelevant.

The Court: If it merely directs attention to the existence or non-existence of the contract, I will allow the question.

Mr. E. B. Stanton: That is the purpose, your Honor.

The Court: Because, if the answer is in the affirmative, then it calls for the documents themselves; if it is a negative, it cannot be inquired into.

Mr. Bronson: The objection will be withdrawn, then.

(Testimony of G. Fred Berger.)

The Court: Beg pardon?

Mr. Bronson: For a yes or no answer. [200]

A. No.

Q. (By Mr. E. B. Stanton): You will note that that speaks of a matter of 50 tons for delivery in June. Did you acquire that 50 tons?

A. Yes, sir.

Q. About when?

A. Oh, quite early in June; I would say the first two or three days.

Q. After you received the merchandise did you at any time pay this tax for your export permit?

A. Well, I answered that just a little while ago by saying that we don't pay it until——

Q. Did you pay the tax in June?

A. No; we didn't pay it in June.

Q. You did not pay it until sometime later?

A. That is right; until sometime later in the year.

Q. Was there any reason you had for not paying your tax immediately?

Mr. Bronson: We will object to that as incompetent, irrelevant and immaterial. The fact is that he did not.

The Court: I think that depends on two things: One, on the question of law whether the requirement was to pay immediately; and second, if it is, whether there was any period of grace given for payment or a choice is given.

Mr. Bronson: May I interrupt a moment? [201]

(Testimony of G. Fred Berger.)

The Court: Yes.

Mr. Bronson: I think the witness testified this morning that you could pay at any time that you want to; that it was your initiative when you pay it. Was that correct?

The Witness: Yes, sir.

Mr. Bronson: So that testimony is in the record.

The Court: Read the question again.

Mr. Bronson: Before your Honor makes a ruling I would like to be heard. That may go to a very important point in this case, where the plaintiff has pleaded ready, willing and able to perform. There have been depositions taken that point toward a possible position that they were excused from non-performance; and it is our position here that they have to take one side or the other of that. Those are the decisions, I think. They can't take both sides at once; so just asking him for his reasons may raise that very point. I think that the fact of the matter is that he did not do it, and that would be all that is competent.

The Court: I do not think this is particularly a question of non-performance or a compliance of the requirement of a statute. The payment of a tax would not necessarily affect that. The nonpayment may have several consequences. I do not know. I have no Argentine law which has been called to my attention as to whether the effect of nonpayment [202] is to invalidate the license that

(Testimony of G. Fred Berger.)

has been issued, or whether the payment is a condition precedent upon the issuance.

Mr. Bronson: I believe, your Honor, is the latter point you have made; that he has testified that there is no license issued until you have paid the tax. He has also testified that you can pay your tax any time following the issuance of the permit.

The Court: Any time up to when?

Q. (By Mr. E. B. Stanton): Is there any limitation? A. No.

Q. As to the time after you file your permit as to when you can pay your tax?

A. There is no limitation. I testified this morning that after a certain length of time the Department might call you to point out that there is an application pending, but there is no limitation actually to the time at which you can pay the tax.

The Court: Do I gather, then, from what you say that once your application is pending, the permit will not be issued until the payment is made; is that true?

The Witness: That is correct, sir.

The Court: But then, once having application in, you can choose to delay payment until you are ready to use it, to use the permit, is that it?

The Witness: That is correct. [203]

The Court: I see, all right. I think in view of that I will allow the question, the pending question to be answered.

The Witness: May I have the question again?

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: Will the reporter read the question, please?

(Question read by the reporter.)

A. Yes, sir.

Q. What was that reason?

A. We did not receive the letter of credit, and when a letter of credit was pending we did not wish to add the cost of a tax to our other expenditures; so we delayed until we received the letter of credit.

Q. Did you ever receive this letter of credit from Schenley? A. No, sir. [204]

Q. (By Mr. E. B. Stanton): Now, Mr. Berger, speaking of this tax, how much tax was involved that you are talking about, that you did not pay at that time?

A. Approximately 6,000 pesos, the equivalent of about \$1500 of American money.

Q. On the exchange of pesos, for the record, Mr. Berger, based on your experience as a banker and your familiarity with foreign exchange, can you tell us at this time what the exchange rate on a peso would be to the dollar as of May, 1946?

A. Well, it would be difficult to give you the exact fraction, but the peso is quoted in various classifications. The normal so-called free exchange, and that is what you and I would buy if we were going to the Argentine for travel purposes, is approximately at the rate of four pesos to \$1.00.

However, when it deals with imports, it depends a great deal on what is being imported. The Argen-

(Testimony of G. Fred Berger.)

tine Government controls its imports, not only by duties but also by classifying the imports under various classifications and applying different rates of exchange which are required in order to pick up the necessary dollars. Sometimes they are in favor, as is the case here, and sometimes they are not.

The rate on glucose at the time was at the rate of 3.3582.

Q. 3.3582? A. 3.3582, that is right. [205]

Q. You are sure of that figure, now?

A. 3.3582. May I look at a note? 3.3582 is correct.

Q. That is 3.3582 pesos to the dollar?

A. To the dollar, that is right.

Q. Referring again to this letter of May 23rd, signed by J. B. Donnelly, with a postscript on it—

Mr. Bronson: What is the exhibit number, please?

Mr. E. B. Stanton: Exhibit 5.

Q. Based upon the figure mentioned in this letter of 3.375 pesos per kilogram, have you computed the total consideration for this contract in pesos, based on 1135 tons mentioned in the letter?

A. Unfortunately, I haven't.

Mr. Bronson: I object to that, if your Honor please.

The Court: Just a minute.

Mr. Bronson: Let me ask counsel if I may have your Honor's permission: This is on your issue of damages? You are asking him, as I understood the question—I did not catch it definitely.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: I am asking him for the total consideration in dollars on what we calculate was the purchase contract.

Mr. Bronson: 1135 tons?

Mr. E. B. Stanton: Yes.

Mr. Bronson: Objection withdrawn. I did not understand [206] it.

The Witness: I have not calculated it. I have not made that calculation as yet.

Q. (By Mr. E. B. Stanton): Well, can you give us the basis for making the calculation?

A. The basis for making the calculation, in dollars, would be 1135 times 1375 pesos divided by the 3.3582, to provide the necessary dollars.

Q. Now, I note that there are certain specifications mentioned in this letter exhibit. Did you do anything about those specifications on the glucose which was eventually delivered to you?

A. Yes. Each delivery which was made was subjected to an analysis, a sample analysis taken by a separate company called the Control Co., which is an entirely independent company making a business of taking samples of various items that are to be examined and having those examined under their supervision, by a chemist or a laboratory, a certified laboratory under the Argentine general business rules.

Q. This company you mention——

A. The Control Co.

Q. ——they are independent of any individual brokerage house, then?

(Testimony of G. Fred Berger.)

A. Oh, yes, absolutely.

Q. Did you take this method to have your glucose [207] examined?

A. Each shipment—each consignment we took was subject to a special analysis.

Q. Showing you a letter dated May 31, 1946, I ask you if you can identify that? A. Yes, sir.

Q. What is it?

A. That is the report from the laboratory, a recognized laboratory, on a shipment of glucose to the extent of 50 tons.

Q. Does that have any bearing on your transaction at all?

A. Yes, that is the original 50 tons we purchased from "Intercont."

Mr. E. B. Stanton: I ask that this be introduced in evidence as plaintiff's exhibit next in order, with the Court to give us a translation of it.

The Clerk: Is this received, your Honor?

The Court: All right, it may be received.

The Clerk: It will be Plaintiff's Exhibit 26, in evidence.

The Court: This exhibit is on the stationery of Laboratorio Quimico Suizo Argentino, Established 1893; Dr. Juan Pelisch, Official Chemist of Argentine Industrial Union; address, Buenos Aires, No. 98.230, the 31st of May, [208] 1946.

Analisis of Liquid Glucose—

Sample produced by Engran S. R. Limited, San Martin 321.

165 casks of liquid glucose weighing 50.000 kilos net, stored at Catalinas Sud, galpon 18.—

(Testimony of G. Fred Berger.)

The Witness: That is Warehouse 18.

The Court: It is supposed to be a tier, because this is where they stored it. Warehouse. Well, all right. That is all right. That is excellent.

In Warehouse 18, Buenos Aires, May 27, 1946.

The seals are unbroken: Control Company, Limited, 48.—

Analysis:

Viscosity, 15 degrees Centigrade, 1.447—44°6 B'e.

I think that is Baume.

Sulfuric—now, off the record, I can't translate this.

Sulfurosox means sulfuric. I don't know what that "Anhidro" is.

Mr. Bronson: Anhydrid.

The Court: Sulfuric Anhydrid (SO_2) 0.0027 and a percentage mark.

Color, crystal clear. It is in English, crystal clear.

Impurities, 0.01 per cent.

Heavy metals, none found. It says, "no tiene."

I presume that means it does not contain them.

And then it is signed Juan Peline. [208-A]

There are some pencil notations. Whose are those, at the bottom?

Mr. E. B. Stanton: Those are not offered, your Honor. If there are no objections, they are not offered in the exhibit.

The Court: All right. Then, the pencil notations are not part of the exhibit.

Q. (By Mr. E. B. Stanton): Now, Mr. Berger,

(Testimony of G. Fred Berger.)

based on the experience which you related to us this morning as a banker and one familiar with foreign exchange, you also stated you were familiar with the procedures in the matter of letters of credit; would you tell the Court, explain to the Court the normal procedure in procuring a letter of credit in the United States for transmittal or use in a foreign country?

Mr. Bronson: We are going to object to that. That is one of the issues in the case, and a normal situation would have no bearing on the issue in suit.

The Court: Read the question.

(Question read by reporter.)

Mr. E. B. Stanton: I will limit the "foreign countries" to the Argentine.

Mr. Bronson: Well, the same objection with the correction, your Honor, on the grounds stated. A letter of credit was mentioned, as your Honor knows—I think it is in Exhibit 5—a letter of Mr. Donnelly to send down there, and I think we [209] all know enough about those matters, to know that there are numerous kinds.

Mr. E. B. Stanton: Perhaps you will stipulate, Mr. Bronson, that Schenley could have procured the letter of credit within two or three days, had they desired to do so.

Mr. Bronson: Which letter of credit?

Mr. E. B. Stanton: The letter of credit which is in the contract.

Mr. Bronson: We will not stipulate to that.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: That is exactly what we got to do, in normal procedure. If a person desires to procure a letter of credit within normal procedure, they could do that within a matter of two or three days.

The Court: I don't think that is a matter of expert testimony. I think that involves a question of law and a question of fact. It is not the subject of expert testimony. Furthermore, I can't see that a Brazilian, a man who was in Brazil, could determine how long it would take for a corporation to secure a letter of credit who was in San Francisco.

Mr. E. B. Stanton: He stated, your Honor——

The Court: I know he has experience. That doesn't make him an international expert in the City of San Francisco. Each community has its own methods. The man has been away. I don't think you have lived in California, have you?

The Witness: No, sir. [210]

The Court: I don't see how he can tell how quickly a letter can be had.

Mr. E. B. Stanton: Well, there is testimony in the record——

The Court: If there is a reasonable time—if there is no time limit as to when the letter of credit is to follow, than it is for the Court to determine what is and what is not a reasonable time, and that is not a question which is a subject of expert testimony. Furthermore, as you know, Federal Courts do not favor expert testimony. As a matter of fact, we can allow it and then tell the Jury to dis-

(Testimony of G. Fred Berger.)

regard it and the court can disregard it and nobody can complain about it, and we allow it very, very rarely and only in those things about which the Court cannot know, and that is like medicine and the like, science and the light.

Mr. E. B. Stanton: The point here is, your Honor, that there are several written communications in here, of inquiry concerning the whereabouts of this letter of credit, of Mr. Whipple——

The Court: And you are also anticipating a matter of defense, which may not be necessary, that they are going to claim also reasons for the delay. You can wait until they do that. Then you can argue. But I think ultimately it is not a question of expert testimony. I mean the conditions under which you obtain a letter of credit would depend upon the [211] community.

Mr. E. B. Stanton: Of course, if the Court is going to consider whether or not they secured the letter of credit within a reasonable time, unless the Court has something before it as to what is reasonable time——

The Court: A question of reasonable time is for the Court to determine and not the person in Brazil. A letter of credit requires certain arrangements for deposit of funds. It is like getting a bond. It may take you time. If it is a large corporation, the mere fact that it is a large corporation does not mean that you can secure a bond very quickly. It all depends on what requirements the bonding company make.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: We have the correspondence which limits the matter to the Chase National Bank, or the bank at Boston, which I think ties the thing down a little more closely.

The Court: Then, it becomes a question of law. A letter of credit, if issued to any bank, is good anywhere. The mere fact that a person designates a certain particular bank does not bind anyone to do it. You may do it through another bank, because a letter of credit on any bank is good. Suppose you sent money abroad. I happen to know about that, because I send money constantly to Paris, for books in French and in other languages. So long as I send a draft in dollars, it does not make any difference whether I send it through Chase [212] National Bank or through the Bank of America. They have direct correspondents providing them with a letter of credit that is honored in that particular country. At any rate, it is a question of argument. It is not a question of expert testimony.

Mr. E. B. Stanton: I will withdraw that particular question.

Q. Mr. Berger, assuming that proper application for letter of credit were made to the Chase National Bank, assuming the funds being available, how long would it take Chase National Bank to issue its letter of credit and cause the same to be communicated to a principal in Argentine?

Mr. Bronson: The same objection on the same grounds.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: I feel that it is a different question, your Honor. We have the former suggestion that the time is up to the Court to determine, whether or not the Schenley Corporation waited a reasonable time to carry out the processing of their letter of credit, but this question is directed to the time, once the application has been made, as to how long it takes the bank——

The Court: He was never employed by the Chase National Bank. How can he tell?

Mr. E. B. Stanton: I think he has testified quite thoroughly as to his qualifications on foreign exchange.

The Court: I know, but a banker in Buffalo, New York [213] can't tell the practices of the Chas National Bank in New York City.

Mr. E. B. Stanton: He has testified, I think, that he had a number of years in New York as an employee of the bank examiner, and that would qualify him as to exchanges.

The Court: I can't see how he can tell how long it should have taken them.

Mr. E. B. Stanton: Perhaps I can qualify him further on the point, your Honor.

The Court: Well, go ahead, but I cannot see that anybody can testify to that, except an employee of the bank in charge of that particular department. I cannot see how a person—you might take the manager of the Bank of America across the street and he would not be qualified to say how long

(Testimony of G. Fred Berger.)

it would take the bank, the Chase National Bank. He might testify about how long it would take them. I can't see how anyone except an employee of a bank can state how long it would take.

Q. (By Mr. E. B. Stanton): Mr. Berger, have you had any experience in the banking business with the issuance of letters of credit?

A. Yes, sir.

Q. What banks?

A. At the Equitable Trust Company, which is now part of the Chase National Bank. [214]

Q. When was that?

A. In 1924, in 1923 and in 1922.

Q. Did you have any further experience, other than that, in the issuance of letters of credit, as a banker?

A. As a bank examiner, I have examined all of the phases of the matter for a period of ten years, mostly in foreign exchange, of course. [215]

Q. Now, specifically in reference to issuance of letters of credit?

A. That is correct.

Q. In the past four years that you have been in the import-export business have you procured letters of credit yourself from the bank?

A. Yes, sir.

Q. Have you had any experience with the two banks mentioned in this testimony?

Mr. Bronson: Which are those?

Mr. E. B. Stanton: Chase National Bank and the Bank of Boston.

(Testimony of G. Fred Berger.)

A. Well, the First National Bank of Boston in Buenos Aires, yes, definitely. They are our bankers.

Q. How long does it take you to procure a letter of credit from those banks?

Mr. Bronson: We will object to that, if your Honor please, as not the subject of expert testimony.

The Court: I will allow a general question to be asked. I think you are taking a good deal of time. I do not have to accept the showing of expert testimony if, in my opinion, I feel that it is not a matter which is universal so that you can tell what time it would take under all circumstances. I will overrule the objection and allow it to go in. [216]

Mr. E. B. Stanton: You may answer the question.

The Witness: Can I have the question read, please?

(Question read by the reporter.)

Mr. E. B. Stanton: Referring to the First National Bank of Boston and the Chase National Bank.

Mr. Bronson: That is a double question? Let us have them separately.

Mr. E. B. Stanton: Not referring to the Chase Bank.

A. Well, my reference cannot be to the Chase Bank because we do not deal directly with Chase, but we do deal with the First National Bank of Boston.

(Testimony of G. Fred Berger.)

Q. Limiting your answer to the First National Bank of Boston.

A. Referring to the First National Bank of Boston, it takes us about 15 minutes' conversation and then long enough for them to process the credit, which is possibly the rest of a business day.

Q. In any event not longer than two days in any one instance?

A. Oh, at the outside, two days.

Q. Prior to the first of June, 1946, did you have any direct correspondence with the Schenley Corporation?

A. Prior to June?

Q. Prior to June 1st. A. No, sir. [217]

Q. Subsequent to June 1st did you have any direct correspondence with the Schenley Corporation?

A. If cables are correspondence, the answer is yes.

Q. When?

A. I sent one cable on June 5th and another one June 7th or 8th.

Mr. E. B. Stanton: All right. Do you have the original of this cable of June the 5th? Let the record show counsel has stipulated to show the witness or to use a copy of the original cable which they acknowledge they have in their file.

Q. I will show you this copy of a cable on the All America Cable and Radio system, dated June the 5th, Buenos Aires, signed "Engraw" and ask you if you recognize that cable? A. Yes, sir.

Q. Is that the cable that you referred to when

(Testimony of G. Fred Berger.)

you stated that you communicated with Schenley by cable?

A. That is the first one; yes, sir.

Q. And the white slip, the white slip that is attached to it, what is that?

A. That is a notation from the All America notifying——

Mr. Bronson: It is a little hard to hear. I am sorry. Could I ask you to speak up?

A. I am sorry. Yes; that is a notation from the All [218] America, at my request to investigate the receipt of that cable by Schenley Distillers in Cincinnati, and they advise that it was received on the 6th day at 9:08 in the morning United States time.

Mr. E. B. Stanton: I ask that this be introduced into evidence as Plaintiff's next exhibit.

The Clerk: Is it admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 27 in evidence.

PLAINTIFF'S EXHIBIT 27

"All America Cables and Radio

NLT Buenos Aires, 5 de Junio de 1946

Schenley Distillers

Cincinnati Ohio

Acting good faith Whipl Losangeles confirmation letter your Sanfrancisco office have contracted for 1135 tons glucose under specification crystal-

(Testimony of G. Fred Berger.)

clear fortythree fortyfive degree baume USP stop
To assure June delivery have purchased and paid
for fifty tons laboratory test this lot density fifteen
degrees Centigrad 1.447 dash 44 point 6 baume
sotwo .0027% crystalclear laboratory reports no-
calcium all deliveries subject same test to protect
you all source same producer stop As credit was
delayed obtained extension contracts because con-
tractors satisfied Schenley purchaser now need
credit immediately otherwise contracts will be can-
celled with penalties stop For references Cain
Chase National Chadsey First Boston wire credit
thru First Boston here

ENGRAW

Cia Engraw Com. e Ind. S. A.

El Presidente'' [220]

Q. (By Mr. E. B. Stanton): Did you receive
an answer to this cable?

A. Not directly to that cable.

Q. What did you then do?

A. Sent another cable.

Q. When?

A. About the 7th or 8th of June. I don't remem-
ber the exact date.

Mr. E. B. Stanton: You are familiar with this
copy I am going to show him now, Mr. Bronson,
of the 8th of June to Schenley Distillers. Will you
stipulate that the copy of this original was re-
ceived by you, is that right?

(Testimony of G. Fred Berger.)

Q. I will show you this cable bearing date June 8th, addressed "Schenley Distillers Cincinnati Ohio", signed "Berger Engraw" and ask you if you recognize that? A. Yes, sir.

Q. What is that?

A. That is the cable I sent to Schenley Distillers at Cincinnati on June 8th.

Mr. Bronson: Sent on June the 8th?

The Witness: Sent on June the 8th.

Q. (By Mr. E. B. Stanton): And the white slip attached to it is what?

A. And the white slip is an advice, an answer from All America Cables to my request for an investigation, advising [221] that the cable had been delivered on the 10th day of June at 9:00 o'clock in the morning United States time.

Mr. E. B. Stanton: I ask that this be introduced in evidence as Plaintiff's next.

The Court: It may be received.

Mr. Bronson: We will object to that, if your Honor please.

The Court: Oh, I beg pardon.

Mr. Bronson: Could we have your Honor withdraw that momentarily, please?

The Court: I will do that. I am sorry. I was a little too quick.

Mr. Bronson: We will object to it on the grounds it is incompetent, irrelevant and immaterial. It was after the notice that we would not make a contract with them.

(Testimony of G. Fred Berger.)

The Court: All right. Let us see it.

Mr. E. B. Stanton: I would like to be heard on that matter, your Honor.

The Court: All right.

Mr. E. B. Stanton: It is set forth in the pleadings the fact that there was a period of time during which negotiations took place between the plaintiff and the defendant regarding this alleged purchase of glucose. This is leading into the negotiations which took place, and the answer to this cable which will be our next offering, in [222] effect opened the negotiations with reference to the settlement of the matter which led actually to further damage of plaintiff, as alleged in the complaint, and opened the period of time lasting some four months during which time the Schenley Corporation was negotiating with the plaintiff concerning this purchase.

It is part of a chain of evidence which must be introduced. I think that cable should be taken into consideration with the reply to the cable.

Mr. Bronson: We might as well, if your Honor please, make our position plain here, that anything between these parties under the state the pleadings are in, anything that took place after the notice that Schenley gave that they did not intend to go through is beside the point. We take a position they can't blow hot and cold. If they are ready, able and willing, export licenses and all the considerations to go through, that is one thing; but if they could not fulfill their contract for any period of

(Testimony of G. Fred Berger.)

the serial deliveries, and seek to establish liability on the basis that their performance was excused, that is an alternative position that can't stand with the other one.

Mr. E. B. Stanton: There is no claim anywhere along the line, Mr. Bronson, that we could not fulfill our deliveries. We were ready, able and willing to fulfill our deliveries at all times and could deliver at any time. This [223] is the negotiation which took place here by Schenley which prevented us from acting.

Mr. Bronson: I then fail to see that this is within the purview of the pleadings at all.

The Court: There is this possibility: When a contract is repudiated it is the duty of the person, the beneficiary of the contract, to do all in his power to minimize the damage. If by reason of the attitude of the other party he is induced to delay any action leading toward minimizing of damage, then it becomes a material factor in the case.

I am making the statement in view of the statement of Mr. Stanton that there was a delay here in actually liquidating the purchasers that may have resulted in additional damages.

Mr. E. B. Stanton: That is essentially our position.

Mr. Bronson: That is not what they have pleaded here, your Honor. They stated that they were ready, willing and able at all times.

The Court: That is true so far as performance.

(Testimony of G. Fred Berger.)

Mr. Bronson: Yes.

The Court: Damages from the breach. This would have a bearing on damages, not on the contract itself. This is on the amount of damages. There was a case decided the other day by the Ninth Circuit where I had just the opposite situation. It is the case of Basich Company against some [224] insurance company—I forget which—and in that case it was one of those typical actions for the default of a subcontractor where the contractor sued the bonding company on the bond. And in that case the argument was made that the contractor acted too fast. He walked in and took charge of the work and completed it, and did not give the insurance company an opportunity to complete it.

I found that the letters were explicit enough to inform them of the default, and the fact that the subcontractor moved out of the job and it was up to them under the contract to go in, and having failed to do so, it was the duty of the contractor, in order to minimize the damage, to go on from there. The Circuit Court affirmed the position.

Mr. Bronson: That was on the point of mitigation.

The Court: Yes; just the reverse of this situation. Now, here, as I gather, they are going to argue that the damages were increased because they did not liquidate immediately, and the reason they did not liquidate was because of *pour parler*,

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: From the standpoint of so long as we are talking foreign languages, that were going on, the discussions that were going on back and forth as to what was to be done in the matter.

Another reason why I think this cable is admissible is merely as a notice on the part of Engraw that they are not recognizing any repudiation of the contract but they are [225] insisting on its terms. To some extent it is——

Mr. Bronson: Self-serving. I wanted to say that.

The Court: ——a self-serving letter and Engraw is putting forth its best foot in giving its point of view. But aside from that, it is on the whole a notice that they are going to hold them to the contract to avoid any question as to whether there was acceptance or acquiescence in this repudiation of the contract, assuming that there was repudiation.

The objection is overruled. It may be received. Do you want this notice?

Mr. E. B. Stanton: Yes. I think that should be attached to the document.

The Court: Well, that notice is attached.

Mr. E. B. Stanton: From the standpoint of timing.

The Court: Was this sent to you with the copy of this copy you are filing and you merely attached it? This is the original from the company?

A. That is the one that came several days later.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: The defendants have admitted possession of the original that was received by them. However, they have stipulated that this copy may be used.

The Court: Well, this copy is merely a service message, entitled "Service Message" and was addressed in English. Then after giving the notice, refer to it as "NLT 62T8 Engraw [226] Comercial, etc., Buenos Aires. June 12 3:12 PM 46.

"We are informed from Cincinnati Ohio that your cable NR-218/8 NLT Schenley Distillers Cincinnati Ohio was delivered on the 10th around 9:00 o'clock AM."

And then greetings of All America Cable and Radio, Incorporated; and in the lower left-hand corner "57/MTO."

That may be received as one exhibit. I think I had better take this pin out so you attach that.

The Clerk: There is another one attached to the other cable. That is Exhibit 28. [227]

PLAINTIFF'S EXHIBIT 28

"All America Cables and Radio

June 8th, 1946

N. L. T.

Schenley Distillers

Cincinnati Ohio

You received ours giving specifications of contracts purchased for your account and laboratory test June shipment glucose stop We believe we are

(Testimony of G. Fred Berger.)

entitled courtesy cable reply stop We are not speculators and if you dont desire coverage will liquidate but if loss occurs must protect our interests stop If glucose desired please cable number letter credit socan proceed June shipment stop For personal reference Reuben Hays Firstnational Cincinnati

BERGER ENGRAW

CIA. ENGRAW COMERCIAL E IND. S. A.

G. Fred Berger,

President." [228]

Mr. E. B. Stanton: Did the court note there was a similar translation or a similar Spanish document attached to the previous exhibit?

The Court: No; I did not look at that.

Mr. E. B. Stanton: I am sorry.

The Court: All right; I am sorry.

The Witness: I translated it over here, your Honor.

The Court: You said it was a notice; I understand that. Well, I will read that one, Exhibit 27. It is a service message from "All America Cables and Radio" dated June 7 8:23 p.m. 46.

"Refer to NLT 69 T5, addressed to Cia Engraw.

"Referring to your cablegram No. 368/5 directed NLT Schenley Distillers Cincinnati Ohio we are informed by the office in Cincinnati Ohio that the above mentioned cablegram was delivered on the 6th at the hour of 9:08 United States time."

(Testimony of G. Fred Berger.)

Q. (By Mr. E. B. Stanton): Did you receive a reply to that last cable, Mr. Berger, that you sent to Schenley? A. Yes; I did.

Q. Approximately when, if you remember?

A. I am not quite certain. I think it must have been around the 12th of June.

Q. I show you this document purporting to be an original cable on the stationery of All America Cables and Radio, dated June the 12th and signed "Metcalf Distillers," [229] directed to Engraw and ask you if you recognize that? A. I do.

Q. What is that document?

A. This is the cable received from Mr. Metcalf in Schenley Distillers, dated June the 11th and received by us on June 12th.

Mr. E. B. Stanton: Will counsel stipulate that Mr. Metcalf is an employee, or was at that time an employee, of Schenley Distillers?

Mr. Bronson: Not in connection with this offer. We will make that stipulation as a matter of fact.

Mr. E. B. Stanton: I am only making the stipulation inasmuch as the signature on this wire is a little misleading. It says "Metcalf Distillers." Will you stipulate that this was sent by a Mr. Metcalf who was at that time in the employ of Schenley Distillers Corporation?

Mr. Bronson: Yes.

Mr. E. B. Stanton: I offer this into evidence now as Plaintiff's next in order.

Mr. Bronson: We will object to that, if your

(Testimony of G. Fred Berger.)

Honor please, upon the grounds it is incompetent, irrelevant and immaterial.

The Court: I will have to look at that.

Mr. Bronson: That is, we are making the same position as previously stated on the last preceding exhibit. [230]

The Court: I will admit it, limited to the purpose already indicated as to the other, as bearing upon any delay which might have increased damages. I am not admitting it as the basis of any negotiation that would validate the contract or admit of its existence, because negotiations, unless we are dealing with a ratification of a contract, which at the present time is not in question in view of the admission of authority—if there was a contract specific enough to be enforced, but limited to delay insofar as it may bear on enhanced damages, it will be received.

The Clerk: Plaintiff's Exhibit 29.

Mr. L. B. Stanton: That is the total purpose, your Honor, of all of this testimony.

The Court: I beg pardon?

Mr. L. B. Stanton: I say, that is the sole purpose of all of this testimony.

The Court: Well, all right. I am glad we are agreed.

Mr. L. B. Stanton: It is not directed to ratification at all.

The Court: All right.

The Clerk: Plaintiff's Exhibit 29 in evidence.

(Testimony of G. Fred Berger.)

(PLAINTIFF'S EXHIBIT 29 is in the following words and figures to-wit:)

All America Cables and Radio

NLL [231]

“BS66 New York 59 11

NLT Edgraw Commercial and Industrial SA San Martin 329 Baires

Replying your cable our negotiations have been carried on with Whipple Los Angeles who has been kept fully informed of our position regret exceedingly confused situation which has developed and suggest you advise me Schenley Newyork of extent of your uncancellable commitments also telephoning Whipple today

METCALF DISTILLERS”

The Court: What are we waiting for, gentlemen?

Mr. E. B. Stanton: I am waiting for a document to be produced, your Honor.

Mr. Bronson: Oh, here. I thought Mr. Rowe told you that you could go ahead and use it.

Q. (By Mr. E. B. Stanton): Did you reply to that last cable? A. Yes, sir.

Q. The one received, signed Metcalf Distillers?

A. Yes.

Q. I show you a cable on All America Cables and Radio, dated June 14th, 1946, signed “G. Fred Berger”, addressed to “Schenley Distillers New York Ctiy” and ask if that is the reply that you made? [232] A. That is correct.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: Counsel, will you stipulate that the original of this wire was received by defendant corporation?

(Counsel conferring privately.)

Mr. E. B. Stanton: Will you so stipulate it?

Mr. Bronson: So stipulated. That is dated June 14th and received on the 15th.

Q. (By Mr. E. B. Stanton): What does "LC" mean on these cables?

A. That means the same as deferred cable in English.

Q. Like a night letter, for example?

A. No. NLT is night letter, and the reverse of a deferred cable down is LC up. It probably has some Spanish meaning that I do not know. That is what it means.

Mr. Bronson: We will concede that that is a day letter.

Mr. E. B. Stanton: We will ask this be received in evidence as the plaintiff's next exhibit in order.

Mr. Bronson: The same objection upon the same grounds, your Honor.

The Court: All right.

Mr. L. B. Stanton: We might stipulate, counsel, that your objection will go to all of this.

Mr. Bronson: I would like to get the court's consent on any understanding to any objections.

The Court: No; I don't like that. I have been a judge too long to like objections that are too general.

(Testimony of G. Fred Berger.)

Mr. Bronson: I don't mind, if your Honor can put up with it.

The Court: However, this series, I think it may be understood that this series of cables, gentlemen, is offered on the theory indicated by Mr. Louis Stanton and on which the court allows it, and that is that it bears upon delay as a basis for aggravation of damages, and as such will be received.

The Clerk: That is Plaintiff's Exhibit 30 in evidence.

(PLAINTIFF'S EXHIBIT 30 is in the words and figures as follows:)

“All America Cables and Radio, Inc.
Sarmiento 500

L C

June 14th, 1946.

Schenley Distillers

Newyorkcity NY

Accordance your cable and to eliminate confusion are cabling Whipple extent uncanceledable commitments and amount liquidation damages

ENGRW

CIA. ENGRW COMERCIAL E IND. SA.

G. Fred Berger

President”

Q. (By Mr. E. B. Stanton): Following the sending of [234] that cable, Mr. Berger, did you hear anything further from the Schenley Corporation or any person representing to be from Schenley?

(Testimony of G. Fred Berger.)

A. We had a cable from Schenley advising us that a Mr. Dichter was going to call to see us.

Q. About when did you receive that?

A. Very close to the end of June.

Q. Do you recall who sent that cable to you?

A. Yes; Metcalf.

Q. In any event did Mr. Dichter so arrive?

A. Yes.

Q. And about when did Mr. Dichter arrive?

A. Either the 1st or 2nd of July, 1946.

Q. Where did you first see Mr. Dichter?

Mr. Bronson: Do I understand, your Honor—I want to be certain about it because we are anxious to protect ourselves in connection with this testimony—that on this particular phase of it a blanket objection will suffice? He is asking questions now and not showing documents.

The Court: All right, overruled. Go ahead.

(Question read by the reporter.)

A. I believe about the 4th of July, because on the 2nd of July, on Mr. Dichter's first visit to our office I was ill.

Q. (By Mr. E. B. Stanton): Now, you say about in [235] July. Prior to that time, prior to the first week in July, had you taken delivery of any more of this glucose from your suppliers?

A. If any—your question is: Prior to the first week in July had we taken delivery of glucose?

Q. Yes; from your suppliers?

A. I believe at that time we had two deliveries, one of 50 and one of 60 tons.

(Testimony of G. Fred Berger.)

Q. Will you relate now to the court in full, as best you can recall, the substance of your conversations with Mr. Dichter, taking them in chronological order?

A. Well, Mr. Dichter advised us at the time of his arrival that he was the party Schenley was sending down, which, of course, confirmed their original cable to us, stating at the same time that he had been sent down to look into the matter of the markets generally and as to our—the market generally as far as glucose was concerned, and also as to the status of our commitments. After a careful examination had been made into these, Mr. Dichter then suggested that there might be some program arranged so that this matter could be either liquidated or cancelled, and, as a result of several conversations we sent a joint telegram, approximately July the 8th, addressed to the Schenley Corporation, which telegram was signed by Engraw and by Dichter and by Berger individually. [236]

Mr. E. B. Stanton: Do you have that telegram?

Mr. Bronson: It is here.

Q. (By Mr. E. B. Stanton): I show you a copy of a cable on the All America Cables and Radio stationery dated Buenos Aires, July 8, 1946, addressed to Metcalf, signed Engraw-Dichter-Berger, and ask you if you recognize that?

A. Yes, sir; this is a copy.

Q. That is a copy of the cable which you just

(Testimony of G. Fred Berger.)

referred to in your testimony? A. Yes, sir.

Mr. E. B. Stanton: Will counsel stipulate that defendant received the original of the telegram that this copy purports to be?

Mr. Bronson: I am positive that that is the one. I am going to stipulate that we received that wire. Is that the 3-signature?

Mr. E. B. Stanton: That is Engraw-Dichter-Berger signature.

Mr. Bronson: What is the date of it?

Mr. E. B. Stanton: July 8th.

Mr. Bronson: Yes; we have that wire. [237]

Mr. E. B. Stanton: I offer this in evidence as Plaintiff's exhibit next in order.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 31 in evidence.

PLAINTIFF'S EXHIBIT 31

All America Cables and Radio

NLT

Buenos Aires, July 8, 1946

C. W. Metcalf

Schenley Distillers

New York NY

Cancellation here would cost approximately forty-fivethousand Dollars stop However opening of lettercredit would atonce eliminate penalty to extent of thirtythousand Dollars and would provide necessary time for orderly liquidation over contract

(Testimony of G. Fred Berger.)

period which is for balance 1946 stop Also sale over such extended period should further reduce probable loss if any to nominal amount therefore we suggest we act as your agents to liquidate contracts using our judgment as to manner of liquidation having in mind reduction of loss to minimum or entirely stop If agreed please advise so we can inform contractors and open letter credit thru First Boston these calculations dont cover Whipl will you deal with him directly

ENGRAW DICHTER BERGER''

Mr. Bronson: Your Honor, I haven't checked them with the written documented evidence and I would like to have it understood it goes to that.

The Court: All right. Let me see it. May I see this?

Mr. Bronson: The same objection goes to the last offer.

Mr. E. B. Stanton: Have you that written memorandum?

Mr. Bronson: Do I have it?

Mr. E. B. Stanton: Yes. I have a photostatic copy.

Mr. Bronson: Let me see it.

The Court: All right, the objection is overruled. It is received. It is dealing with the same problem. As a matter of fact, that speaks of reducing the probable loss, so that without actually knowing what is coming, I anticipate the objection.

(Testimony of G. Fred Berger.)

Q. (By Mr. E. B. Stanton): Did you have any further communications with Schenley following that?

A. Yes. We had a three-way telephone conversation, Mr. Metcalf in New York and Mr. Dichter and I in my office in Buenos Aires.

Q. Will you relate the substance of that? Well, when [238] was that conversation?

A. I would say approximately July 15th.

Q. Prior to that time, did you have any further cable communications?

A. I don't remember any.

Q. Now, I show you a cable dated July 12th, on the Western Telegraph Company form, to Metcalf, signed Engraw, and ask you if that will refresh your memory.

A. Yes, but this was sent by us to Mr. Metcalf after that telephone conversation, because during the telephone conversation he questioned whether in the offer, included in the telegram, a full letter of credit should be necessary.

Q. Then this followed the telephone conversation? A. That is right.

Q. Now, basing your answer on the date of this telegram, would you care to revise your testimony as to the date of that conversation which I believe you said was the 15th?

A. Well, it had to be—it must have been earlier, for the simple reason that after we had this conversation, I checked with the suppliers and obtained from them the story that they would be willing, in

(Testimony of G. Fred Berger.)

this program, suggested program of liquidation, to act under the liquidation program with a 20 per cent letter of credit as the margin.

Q. Now, would you detail a little more fully for us the activities of yourself and Mr. Dichter which led up to [239] this telephone conversation?

Mr. Bronson: The same objection, plus the objection that it is a shotgun question, your Honor. It opens up everything.

Mr. E. B. Stanton: I had only reference to these negotiations.

The Court: No. With reference to these as he mentioned in the cable. Objection overruled.

The Witness: Will you state your question again, please?

Q. (By Mr. E. B. Stanton): Well, if you will detail, just give quite fully now all of the negotiations which you had with Mr. Dichter in Buenos Aires, concerning these glucose contracts.

A. After his arrival and after he had ascertained, on his own, the matter of the market and as to the extent of our commitments, then Mr. Dichter and I made visits to several of the suppliers, and particularly to the large one, S.I.F.A.R., in order to ascertain just exactly what arrangements could be made, either in regard to cancellation, if cancellation was to be arranged, or liquidation, and after we had had these interviews, then we compiled this cablegram of July 8th and sent it to Schenley Distillers.

(Testimony of G. Fred Berger.)

Q. And following that, what happened next in order?

A. And then after we had the telephone conversation——

Q. Now, this was after the—you mentioned you sent [240] the cable on July 8th. Now, what happened immediately after that? Did you receive a reply to that cable?

A. We had the telephone conversation.

Q. The telephone conversation followed the reply to the cable, then? A. That is right.

Q. That is what I want to get at. Now, give us the substance of the telephone conversation?

A. The substance of the telephone conversation was two-fold. In the first place, in connection with liquidation, Mr. Metcalf raised the question that if they were going to liquidate—if we were going to liquidate for them, which is suggested in the cable, that they ought not to be put in a position where they would have to supply the whole amount, as a matter of letter of credit, and I went over to the suppliers with Dichter and they agreed that they would arrange to let us liquidate over the period with a 20 per cent of margin in letter of credit, and that resulted in that cable which I sent to Mr. Metcalf.

Mr. Bronson: I have to move to strike out the answer and all the various parts of it, if your Honor please, on the other ground and for the additional ground that it is purely conclusions of the

(Testimony of G. Fred Berger.)

witness. I was afraid of that when I said that it was too broad a question. He speaks of agreements and so on. [241]

The Court: Will you read the answer? Part of the statements are conclusions, and I think I will strike the answer and have the question read and ask the witness to confine himself to what was said and done, rather than talking about agreements, commitments and the like.

(*Question* read by the reporter.)

Mr. E. B. Stanton: That is referring to the conversation with Metcalf.

The Court: Well, tell us what was said. Put it in the form "He said" and "I said," the old fashioned American way, "Sez he" and "Sez I" is a very good way, the only way we can—we are fond of quoting another person—I think it is much superior to the quote and unquote affair which the radio has introduced. All right.

The Witness: Well, Mr. Metcalf referred to the cable we had sent him and raised the question as to, if there were to be liquidation, whether it would be fair to require the Schenley Corporation to file a letter of credit for the full amount required or to require them only to file for a reasonable margin of safety while the liquidation was under way. He also stated that insofar as the program outlined in our letter of July 8th was concerned, that it seemed quite satisfactory to him and authorized us to make

(Testimony of G. Fred Berger.)

contact with Dr. Goytia, and at which point, this being a three-way conversation, I directly interposed with the remark that I did not [242] know whether that would be in keeping, for Dr. Goytia was counsel for us, and Mr. Metcalf then advised that it was perfectly satisfactory from his point of view, because he thought we would have less difficulty in completing any arrangements if Dr. Goytia knew all about the program originally.

Q. (By Mr. E. B. Stanton): This Dr. Goytia that you refer to, who is he?

A. Dr. Goytia—there are two Doctors Goytia—this was Dr. Victor Daniel Goytia, of Goytia & Company, which at one time was the Argentine end of the firm of Momsen, Freeman and Goytia, Momsen being in Rio, Freeman in New York and Goytia in Argentina.

The Court: Are they a legal firm?

A. They are a legal firm, yes.

The Court: You called him a doctor. I thought so because you called him Doctor.

The Witness: That is a legal doctor.

The Court: Yes, I know. All right.

Q. (By Mr. E. B. Stanton): Is there anything further on the conversation?

A. Then I told Mr. Metcalf that we would check on the matter of letter of credit requirement and that we would then proceed to Dr. Goytia's office to complete what seemed to be an agreed arrangement.

Mr. Bronson: Now, I ask that the last expres-

(Testimony of G. Fred Berger.)

sion "what seemed to be an agreed arrangement" be stricken.

The Court: Yes. That may be stricken.

Mr. E. B. Stanton: Well, that is what Mr. Berger said on the telephone.

Mr. Bronson: You are suggesting something, Counsel.

The Court: Let the answer be stricken. If he wants to add something to it, he may do so.

Q. (By Mr E. B. Stanton): What happened following this telephone conversation relating to this glucose matter?

A. We did two things. We discussed the matter with the suppliers who agreed that if liquidation was to be arranged, they would take 20 per cent letter of credit and that resulted in the wire which was just identified.

Mr. E. B. Stanton: I now ask that this wire dated July 12th to Metcalf, signed Engraw, on the stationary of Western Telegraph Company, Limited, be introduced in evidence.

Mr. Bronson: The same objection.

Mr. E. B. Stanton: And I will ask you to stipulate that the original of this wire was received by him with a copy.

Mr. Bronson: I can't tell you that until I look through these.

The Court: All right.

Mr. E. B. Stanton: Counsel has suggested that I put [244] this in evidence, now, subject to their

(Testimony of G. Fred Berger.)

checking for the original which may be substituted in place of this copy.

The Court: All right. It may be received.

The Clerk: Admitted as Plaintiff's Exhibit No. 32, in evidence.

PLAINTIFF'S EXHIBIT NO. 32

The Western Telegraph Company Limited

July 12th, 1946

LC

Metcalf

Schenley Distillers

New York NY

Twentypercent lettercredit margin acceptable for liquidation program

Engraw''

The Court: I think the witness would appreciate a recess, so we will give him a recess now.

(Whereupon a short recess was taken.)

Mr. E. B. Stanton: Mr. Reporter, will you read the last question and answer?

(Record read by reporter.)

Q. Now, what was the next thing that took place?

A. Well, the next thing was that we followed Mr. Metcalf's direction and went to see Dr. Goytia and discussed the matter further with him.

(Testimony of G. Fred Berger.)

Q. Did anything happen as a result of your conference with Dr. Goytia?

A. Yes. There was an interchange of cables, then, between the office of Dr. Goytia and the office of Momsen, of Momsen and Freeman in New York, and after that interchange, Mr. Dichter was instructed to go up to Brazil again to finish some work that he had left there rather hurriedly when he came down originally, and Mr. Dichter then returned about the 31st of July.

Q. And when he returned, what happened?

A. We then visited Dr. Goytia's office again and he had had a further interchange of cables and apparently nothing was to be done at the moment.

Q. These cables that you are speaking of in this period of sequence are all between Dr. Goytia's office and Momsen?

A. Dr. Goytia's and Momsen in Momsen's office in New York City, that is right.

Q. You are speaking of that interchange of your own knowledge, are you?

A. Oh, yes. I saw the cables, but we do not have them.

Q. What followed after that?

A. Well, when Mr. Dichter came back on the 31st of July, he was leaving a couple of days later, we discussed more or less, then, in general the entire matter of our contact and then we agreed that we had better write a memorandum of the visit, the whole visit, so as to bring it down into writing as to what had been done.

(Testimony of G. Fred Berger.)

Q. You say you and Dichter agreed to write a memorandum? A. That is right.

Q. Did you write this memorandum?

A. I wrote it, mostly in rough, and then Mr. Dichter and I went over it and then I had it written finally and gave him several copies of it to take with him.

Q. I show you what purports to be a copy on the stationery of Cia Engraw, interoffice communication from G. Fred Berger to Mr. E. R. Dichter at Buenos Aires, August 2nd, 1946, consisting of some five pages, and ask you if you can identify this?

A. Yes. That is a copy of the original memorandum that I gave Mr. Dichter.

Q. And this memorandum covers the period of time that Mr. Dichter was there and what you had accomplished?

A. Well, I think it covers more than that. It covers more or less the history of the program down to date.

Mr. Bronson: Well, the document speaks for itself, your Honor, and I object to it.

Mr. E. B. Stanton: Will counsel stipulate that the original of this memorandum is attached to one of the depositions, I think it is the Heymsfeld deposition, and that this copy may be used in lieu of the original at this time?

Mr. Bronson: I can't stipulate that it can be used. I agree that our file shows that it was an exhibit, taking No. 64-N in Mr. Heymsfeld's deposition taken by you.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: Well, you have no objection to my offering the carbon rather than the original?

Mr. Bronson: No. That may be done.

Mr. E. B. Stanton: I now offer this in evidence.

Mr. Bronson: We object to it on the ground that it is incompetent, irrelevant and immaterial, that it is self [247] serving and that it is conclusions. It meets many objections, your Honor.

The Court: I will have to read it. It is rather long. I don't know whether that is covered.

(A short intermission followed.)

The Court: I think this goes outside of the scope of the telegrams. This is a brief for the plaintiff, very ably written by whoever wrote it.

The Witness: Thank you.

The Court: It is clearly an argument as to why his position is correct. I can't see that it has any bearing, a mere fact he said he gave it to Dichter. Dichter did not approve it.

Mr. E. B. Stanton: Perhaps I might ask you a couple of more questions before your Honor rules on the admission of the document.

The Court: On its face, it says from Mr. Berger to Mr. Dichter. It is a memorandum given to him, occupying his position. It is not an agreement or a statement or an approval of anything of Dichter, in any capacity. It is merely a statement of the company's position and an argument as to why they have a contract and they expect to be made whole for any loss they have had.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: May it be marked for identification?

The Court: It may be marked for identification, only. [248]

The Clerk: Plaintiff's Exhibit 33, marked for identification only.

PLAINTIFF'S EXHIBIT NO. 33

Compania Engraw

Comercial E Industrial S. A.

Buenos Aires, Argentina

Beunos Aires, August 2nd, 1946

Inter-Office Communication

From Mr. G. Fred Berger

To Mr. E. R. Dichter.

Subject: Glucose Contracts.

After numerous cables during April and May covering the subject of the sale of glucose thru Mr. Whipple in Los Angeles, we finally received a telegram under date of May 20th accepting for parties then unknown to us, an offer for 1300 tons which we had made on April 24th and May 9th.

We immediately replied advising Whipple that it was impossible to hold offers firm in a market for glucose such as this has been.

On May 21st, we advised Whipple by L.C. that we had available, subject to prior sale, 600 tons at Arg. Pesos \$1.30 per kilo and outlined conditions of payment which included 25% deposit in cash and advised him also that we would endeavor to

(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

secure an additional amount up to the 1300 tons if he confirmed the price offered in this telegram, i.e. A.P. \$1.30.

On the 22nd of May, we received a telegram from Mr. Whipple, accepting the 600 tons at \$1.30 and offering to accept the balance of the 1300 tons at the same price. In this cable he also advised us that Schenley was the purchaser and would open credit for the entire amount but without a cash deposit which has been requested in our telegram of May 21st, according to the requirement of the supplier.

Under the circumstances and knowing that Schenley was the purchaser, we took the steps necessary to obtain as much of the balance at the same price as possible (our price being \$1.20 F.A.S. and our offer thru Whipple being at \$1.30 F.O.B. so that we had a F.A.S. F.O.B. cost of approximately five centavos, leaving a net to us of five centavos on our F.O.B. offer of \$1.30, subject of course, to special storage charges if deliveries did not coincide with steamer availability) and the suppliers now knowing Schenley as the purchaser dropped the requirement for a cash deposit requiring only the normal opening of the letter of credit.

Under date of May 22nd, we sent an N.L.T. advising Mr. Whipple that we had made the necessary arrangements for 1135 tons to be shipped as follows:

(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

June	50 tons
July	60 tons
August-September	200 tons
September	150 tons
October	275 tons
November	200 tons
December	200 tons

Contracts to cover this, were signed as follows:

600 tons	May 23rd
60 tons	May 22nd
200 tons	May 23rd
75 tons	May 24th
150 tons	May 22nd
50 tons	May 27th

Under date of May 23rd, 1946, your Mr. J. B. Donnelly at your San Francisco office, wrote to Whipple starting his letter "this letter will confirm our telephone conversation and your letter of May 21st" the acceptance being the original 600 tons mentioned earlier in this letter. However, as a P.S. to this letter, Mr. Donnelly added "since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial e Industrial S.A. of 1135 tons with a shipping schedule as follows"; this shipping schedule is the same as we outlined in our telegram of May 22nd so that undoubtedly the body of his letter was dictated some time earlier than the P.S. tho the entire letter was dated May 23rd.

(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

I have mentioned these dates for the simple reason that apparently there seems to be some doubt expressed as to the order in which these contracts were made. We closed them after receiving Whipple's instructions that the sale had been made to Schenley and our advice to Mr. Whipple under date of May 22nd, via N.L.T. so stated, "acting on your cable 21st, have completed firm purchases for account Schenley Distilleries 1135 tons stop" and then we added the shipping schedule which Mr. Whipple must have received under under date of May 23rd.

Mr. Donnelly confirms the acceptance of this offer, his letter being dated May 23rd but please not that Mr. Donnelly's letter of May 23rd confirms a telephone conversation and also Mr. Whipple's letter of May 21st. Mr. Whipple wired us on the 21st, via night letter, which we received the morning of the 22nd, advising us of the approval of the purchase of the entire amount up to 1300 tons and that Schenley would open their credit for the entire amount.

Accordingly, the question of the timing and dating of contracts appears to be one of whether or not there is good faith all around.

It is obvious that we acted in the completion of these contracts only on the strength of our dependence on the fact that this purchase was being made for Schenley of whose credit I am fully familiar as a former banker.

(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

Without attempting to enter into a controversy it would seem that if the present opinion is that we purchased without authority from Schenley, then it seems only fair to point out that in Mr. Donnelly's letter to Mr. Whipple, he in turn, in his P.S., acknowledged and accepted "the offer of Cia. Engraw Comercial e Industrial S.A. of 1135 tons with a shipping schedule as follows" that shipping schedule having been sent by us to Whipple in our N.L.T. of May 22nd so that obviously there was an offer and an acceptance if there was no purchase for account of Schenley.

Under date of June 4th, we received the first telegram from Whipple advising us that apparently something had gone amiss with the contracts, the objection at that time seeming to be based on a required analysis of the glucose.

We immediately advised Whipple of the analysis of the purchase we had made and also advised that our purchase had been made within the requirement of 43-45 Baume U.S.P.

Then, on the 5th of June, I wired Schenley at Cincinnati (Mr. Whipple's wire noted Cincinnati headquarters were refusing to authorize the credit) quoting to them the purchases we have made and the analysis of the test of the spot purchase we had already made in order to be certain to cover their requirements advising them at the same time that each delivery would be subject to a similar test for their protection.

(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

Under date of June 6th, Mr. Wjipple advised us that he had obtained a part of an earlier sample we had sent him and forwarded this to the Schenley Laboratory in Chicago.

Under date of June 8th, I sent a second wire to Cincinnati asking for a reply and under date of June 12th, we received an N.L.T. from Mr. Metcalf regretting the confused situation which had developed and suggesting that we advise him at New York of the extent of the uncancellable commitments.

After the exchange of various telegrams under date of June 14th, I wired Schenley of New York that in order to eliminate further confusion, we were cabling Whipple the extent of uncancellable commitments and the amount of liquidation damages, having ascertained at this time that we could cancel the largest contract for a ten centavos per kilo payment.

Mr. Dichter then reached Buenos Aires and made contact with us and as a result, we sent a joint cable to Mr. Metcalf under date of July 8th, outlining in effect that it would cost approximately U\$S 45,000.—to cancel but that if a letter of credit was opened (a 20% requirement of the total was later arranged) the cancellation penalty of U\$S 30,000.00 would be eliminated and this action would also provide the time for orderly liquidation over the contract period which is the balance of 1946.

(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

We also expressed our belief that there need be no loss in connection with the balance of the contract for if we act as the agent for Schenley to liquidate the contracts, we believe that unless something untoward and drastic were to happen, we should be able liquidate the contracts without loss to any one.

We also took up the matter by cable with Mr. Whipple in order to ascertain the minimum amount of commission for which he would settle and he has left the matter in our hands.

Later telephone conversations with Mr. Metcalf disclosed that apparently he was satisfied to leave the further decision in connection with liquidation or cancellation in our hands together with Dr. Victor Goytia, the Argentine member of the firm Monsen, Freeman and Goytia.

We discussed this matter with Dr. Goytia who exchanged cables with his New York office but during Mr. Metcalf's absence, apparently the legal department chose to take a stand different than that taken by Mr. Metcalf and the situation then became complicated.

As of the end of July, it became necessary for us to assume that Schenley would wish to liquidate (which liquidation Messrs. Dichter, Goytia and Berger had jointly recommended) and in order not to be in violation of the contracts we had entered into for account of Schenley, we picked up a further 160 tons of glucose so that we now have

(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

approximately Arg. Pesos \$250,000. of our funds involved without requiring any advances up to this time.

But the major contractor is now pushing us for a decision as to whether we are cancelling or liquidating (and he is in a position to do so for there has been not deposited the required Schenley credit for 20% of the total contract) and it will be necessary for us to give him an answer shortly.

We personally cannot cancel without violating the contracts into which we entered for account of Schenley, and if we violate them they having been registered with the Chamber of Commerce, we might just as well go out of business.

On the other hand, based on our funds already involved in taking up the July commitments (and there are 300 tons available in August) we are not in a position to go forward without a complete agreement with Schenley either to liquidate or to cancel.

To summarize, on the receipt of knowledge that the purchaser of the glucose in question was Schenley, we were able to eliminate the requirements for a cash deposit and were able to complete arrangements for the purchase of 1135 tons on a delivery schedule outlined in our N.L.T. of May 22nd which Mr. Whipple must have relayed to Mr. Donnelly who acknowledge and confirmed Schenley's acceptance of our offer, including in his acknowledgment

(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

the schedule of shipments which is the same schedule we outlined in our N.L.T. of the night before.

Therefore, if it were to be a question of whether or not we purchased before Schenley confirmed (and this we did not do until we knew that Schenley was the purchaser) the offsetting question seems to be that the information we outlined in our N.L.T. of May 22nd had definitely to be relayed by Mr. Whipple to Mr. Donnelly or he would not have been in a position to acknowledge and confirm the purchases and to further outline the shipping schedules which were for the first time mentioned in our N.L.T. of May 22nd.

So, it would seem that we either purchased for account of Schenley or Schenley's representative completed an acceptance of our officer—it does not seem possible that both actions can be contended.

Assuming for the sake of this memorandum, that Schenley admits either legal or moral responsibility, then the joint recommendation of Messrs. Goytia, Dichter and the writer is that we liquidate the contracts to eliminate both the cancellation cost and any possible reflection on either Schenley or Engraw for not fulfilling the contract, in addition to which it is our belief that the liquidation can in all probability be arranged without loss to any one.

Messrs. Goytia, Dichter and Berger feel that if an allowance for Whipple were made to the extent of U\$5,000—plus U\$S500.—cost, this would be entirely satisfactory to Whipple.

(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

To further summarize, the cable which Messrs. Dichter and Berger sent to Mr. Metcalf under date of July 8th and added to it our suggested settlement for Whipple, the summarization would be as follows:

Local cost of cancellation as outlined in	
the telegram	U\$S 45,000
Whipple's commission and expense	
allowance	" 5,500

Total cost if cancellation is car-	
ried out	U\$S 50,500
If recommended liquidation is carried	
out immediately, the need for pay-	
ment of the cancellation fee is elimi-	
nated which reduces the cost by....	U\$S 30,000

Net cost assuming that the contracts	
cannot be liquidated at better than	
1.20	" 20,500

In view of the fact that the government just at this time has been delaying the issuance of export permits in its fight to reduce the local cost of living, there has been practically no activity in the glucose market which has remained steady at 1.23/1.25 but we already have information from our broker of a large offer pending from the United

(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

States at 1:31 just as soon as export licenses are granted.

So, if it were not for this delay in the issuance of the export permits I believe we could continue liquidation if we had nothing more than the 20% letter of credit pledged to meet the contract requirement with the main supplier.

It is estimated that the export licenses should be coming thru shortly and under the circumstances we cannot help but feel that the major portion, if not all of the U\$S 20,500. shown above as the net cost of liquidation will disappear as contracts are liquidated between now and the end of the contract period which is December 31, 1946.

Accordingly, we are most hopeful that Mr. Metcalf will agree to the suggested program of liquidation and will therefore arrange to have the letter of credit deposited and authorize us to proceed with the liquidation taking such steps as may be necessary to carry it thru successfully in accordance with the program already outlined by Messrs. Goytia, Dichter and Berger.

CIA ENGRAW COMERCIAL E
INDUSTRIAL S.A.

/s/ G. FRED BERGER,
President.

GHB:MBF

Q. (By Mr. E. B. Stanton): Following that

(Testimony of G. Fred Berger.)

memorandum, then, did Mr. Dichter leave South America?

A. Mr. Dichter returned to the United States.

Q. And do you have any further communication from Mr. Dichter or anyone else in the Schenley organization?

A. Before Mr. Dichter left and after we had read and approved that memorandum——

Mr. Bronson: Just a moment. [249]

Mr. E. B. Stanton: Answer that yes or no.

The Witness: Oh, excuse me.

Mr. E. B. Stanton: Just answer the question yes or no.

The Witness: I would like the question again, then.

Mr. Bronson: May the answer be stricken out? We could not hear it here, anyway.

The Court: Yes; it may be stricken.

(Question read by the reporter.)

A. Yes.

Q. (By Mr. E. B. Stanton): What was that?

A. I received a cable from Mr. Dichter about September 8th from Milwaukee in answer to one I sent him asking as to what was the result of his visit, his visit after his return to New York, and what the final decision was, what was the final decision.

Q. I note you mentioned a date in your testimony as September 8th. I show you this telegram, copy of a telegram dated August 8th on the stationery of the Western Telegraph Company, to Emmanuel Dichter, signed Berger.

(Testimony of G. Fred Berger.)

A. I am sorry. August the 8th, of course, is the date, because Mr. Dichter left for the States on August the 2nd.

Q. Is that the wire that you are referring to which you sent? [250]

A. That is right.

Mr. E. B. Stanton: I ask that this be introduced in evidence as Plaintiff's next in order. The original of this wire, I believe, is in the Heymsfeld deposition. Will you stipulate that this wire was received by the Schenley Company?

Mr. Bronson: Yes.

Mr. E. B. Stanton: I will offer this copy in evidence.

Mr. Bronson: The same objection on the same grounds.

The Court: This group goes along with the others. Overruled.

The Clerk: Plaintiff's Exhibit 34 in evidence.

PLAINTIFF'S EXHIBIT 34

Reads in words and figures as follows, to wit:

"The Western Telegraph Company Limited

August 8th, 1946

L. C.

Emmanuel Dichter

150 Bennett Avenue

New York NY

Important please cable decision or status regards.

BERGER.

(Testimony of G. Fred Berger.)

CIA. Engraw Commercial E Ind. S. A.”

Q. (By Mr. E. B. Stanton): Did you receive a reply to that cable?

A. Yes; I received a reply from Mr. Dichter.

Q. I show you this cable bearing date of receipt August 10th, addressed Berger, signed Dichter from Milwaukee, and ask if you recognize that?

A. I do.

Q. Is that the cable you received in reply?

A. It is.

Mr. E. B. Stanton: I now offer this in evidence as plaintiff's next exhibit in order.

Mr. Bronson: The same objection upon the same grounds.

The Court: The same or similar type. Overruled.

The Clerk: Plaintiff's Exhibit 35 in evidence.

PLAINTIFF'S EXHIBIT 35

Reads in words and figures as follows, to wit:

“The Western Telegraph Company, Limited

No. 00687

Telegrama

DLH38/10 WU Milwaukee Wis 12 10

LC Berger F-5 Edificio Kavanaugh Baires

Legal department will inform promptly.

DICTER.”

(Testimony of G. Fred Berger.)

Q. (By Mr. E. B. Stanton): Did you receive any further replies or answer from or communications from Schenley? A. No, sir.

Q. What was the next contact, if any, that you had with Schenley Distillers? [252]

A. I left the Argentine on August the 24th and Brazil on August the 31st, reaching New York on September the 1st. I had a meeting with Mr. Hosey and Mr. McManus, who are connected with our organization in the states, and our meeting was with Mr. Heymsfeld, who I understand is general counsel of the Schenley Corporation, in the offices of the Schenley Corporation in the Empire State Building on September the 4th.

Q. What occurred at that conference?

A. We discussed various matters and, as a result, Mr. Heymsfeld advised us that Schenley had no further intention of going through with any arrangement or any discussion we had had with Mr. Dichter during his visit, and, insofar as the contract was concerned nothing was to be done about it.

Q. Anything further at that conference that you can recall?

A. Well, there was supposed to be a further conference, I believe about September 15th, which conference was not held.

Q. Were any sums discussed, any amounts?

A. We outlined in a general way what was——

Mr. Bronson: I think we will object specially, if your Honor please.

(Testimony of G. Fred Berger.)

The Court: Objection sustained. [253]

Q. (By Mr. E. B. Stanton): Did you have any further communications with Schenley Corporation?

A. Under date of September 18th, I believe, I wrote them a letter.

Mr. E. B. Stanton: Do you have the original of this letter?

Mr. Bronson: Exhibit B, is that what you are talking about?

Mr. E. B. Stanton: Yes.

Q. I show you a carbon of a letter dated September 18, 1946, to Ralph Heymsfeld, signed "G. Fred Berger." Can you identify that copy?

A. Yes, sir; that is the copy.

Q. That is the copy of the letter which you——

A. Of a letter which I mailed to Ralph Heymsfeld, Esq. under registered mail on September 18, 1946.

Mr. E. B. Stanton: Counsel, will you stipulate that this letter was received by Ralph Heymsfeld?

(Counsel conferring.)

Mr. Bronson: I am asking you if you do not have a reply?

Mr. E. B. Stanton: I have a reply.

Mr. Bronson: Are you going to use it?

Mr. E. B. Stanton: Yes. Will you stipulate I may use the carbon in lieu of the original? [254]

Mr. Bronson: I beg pardon?

Mr. E. B. Stanton: The original is attached to the Heymsfeld deposition.

(Testimony of G. Fred Berger.)

Mr. Bronson: Yes; I so understand, and you may use the carbon in lieu of the original. I am objecting to the admission of the document on the same grounds heretofore stated for the bulk of these documents put in by the witness Mr. Berger, and on the additional ground it adds nothing to what took place on June 6, 1946.

The Court: All right, the objection will be overruled. This is along the same line.

Q. (By Mr. E. B. Stanton): Did you receive a reply to that letter?

The Clerk: Plaintiff's Exhibit 36 in evidence.

PLAINTIFF'S EXHIBIT 36

Reads in words and figures as follows, to wit:

“September 18, 1946

Ralph Heymsfeld, Esq.
Schenley Distillers Corp.
350 Fifth Avenue
New York 1, New York

Dear Sir:

This is to notify you that the suppliers with whom we contracted for the 1135 tons of glucose which we brought for your Company have finally refused to accept cancellation of the contracts. We are, therefore, proceeding to sell the glucose at best prices obtainable and will, of course, look to you for payment to us of the difference between the

(Testimony of G. Fred Berger.)

prices thus obtained and the price at which you contracted to purchase the same.

“Very truly yours,

COMPANIA ENGRAW COMMERCIAL E INDUSTRIAL S. A.

(initialed) G. FRED BERGER,
President.

“GFB-gem

“Registered Mail.”

Q. (By Mr. E. B. Stanton): Did you receive a reply to that letter?

A. Yes, sir; I did.

Q. I show you a letter on the letterhead of Schenley Distillers Corporation, dated September 20, 1946, signed “Ralph T. Heymsfeld,” addressed to Compania Engraw. Do you recognize that?

A. Yes; I do.

Q. Is that the reply that you received?

A. It is.

Mr. E. B. Stanton: I offer this next in evidence.

Mr. Bronson: Is that an exhibit in Mr. Heymsfeld’s deposition?

Mr. E. B. Stanton: That is the original letter from [256] Mr. Heymsfeld.

The Court: Overruled. It may be received.

The Clerk: Plaintiff’s Exhibit 37 in evidence.

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT 37

Reads in words and figures as follows, to wit:

“Schenley Distillers Corporation
Empire State Building
350 Fifth Avenue
New York 1, N. Y.

September 20, 1946

“Compania Engraw
Comercial E Industrial S.A.
San Martin 329
Buenos Aires
R. Argentina

Dear Sirs:

Your letter of September eighteenth has been received and in reply we beg to advise that the statement in your letter that you bought glucose for our Company is incorrect and that, as you have been previously and repeatedly advised, we have no obligation to you in the matter.

“Yours very truly,
SCHENLEY DISTILLERS
CORPORATION,

/s/ RALPH T. HEYMSFELD

CC Mr. G. Fred Berger
Room 1807
Hotel New Yorker
New York, N. Y.”

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: Now, at this point I would like to offer into evidence an Inter-Office Communication dated July 12, 1946, which happens to be Plaintiff's Exhibit 39-N attached to the deposition of Mr. Heymsfeld, the genuineness of which has been admitted by the defendant, an inter-office communication signed C. W. Metcalf, dated July 12, 1946.

Mr. Bronson: We make the same objection as we do to all of the documents in this chapter of the proceedings.

The Court: All right.

Mr. Bronson: Do you want to show that to the court at this time?

Mr. E. B. Stanton: Yes. I will have to take this exhibit apart here.

Mr. Bronson: He wants to read it to be following it properly.

The Court: Have those depositions been filed?

Mr. L. B. Stanton: They are in the file but I do not think they have been offered into evidence.

The Court: In that case you do not need to tear that apart. We can take them by reference.

Mr. E. B. Stanton: I have a copy here, your Honor.

The Court: A loose copy?

Mr. E. B. Stanton: Yes.

The Court: All right. [258]

Mr. E. B. Stanton: I will show you the copy, your Honor, and then that is my only copy, but we can use the one from the deposition.

(Testimony of G. Fred Berger.)

The Court: You can take it by reference.

Mr. E. B. Stanton: Will that be read into the record, then, your Honor? That is the only copy I have.

The Court: Isn't there another copy attached?

Mr. E. B. Stanton: There is a copy attached to the deposition.

The Court: All right. Then where is the deposition?

Mr. E. B. Stanton: The court must have it in the file of the court.

The Court: We can receive it by reference. You do not need to read it into the record. All the depositions are in the hands of the clerk. Which deposition is it, Heymsfeld?

Mr. L. B. Stanton: It has the number on it. It has the number right on there.

Mr. Bronson: Yes; it is here.

The Court: What is the number of it?

Mr. Bronson: 39-N. They are in order chronologically.

The Court: Where is the number marked on it?

Mr. Bronson: I think they are on the exhibit.

The Court: The white sheet?

Mr. Bronson: No. I think it is on the other part, [259] isn't it? They are marked right on the exhibits.

Mr. L. B. Stanton: They are marked right on here, your Honor. Your Honor will see right there.

The Court: Oh, yes.

(Testimony of G. Fred Berger.)

Mr. Bronson: Can I pass those now to the reporter to be copied?

The Court: Yes. Inter-Office Communication dated July 12, 1946, signed by "C. W. Metcalf," and which is Plaintiff's Exhibit 39-N to the deposition of Mr. Heymsfeld will be received in evidence and marked Plaintiff's Exhibit——

The Clerk: 38.

The Court: 38 in evidence.

Mr. Bronson: That will be copied into this record, I take it?

The Court: Oh, yes; transcribed into the record. That is right.

PLAINTIFF'S EXHIBIT 38

Reads in words and figures as follows, to wit:

"Inter-Office Communication

July 12, 1946

I talked to Messers. Berger and Dichter regarding the Engraw glucose matter. I told Mr. Berger that we had retained Monsen & Freeman of New York to represent us in settling this matter and that Dr. Victor Goytia, [260] 501 Avenida Rogue, Saenz Pena, Buenos Aires, was the Argentina representative of Monsen & Freeman and that they were to get in touch with Dr. Goytia in relation to this matter.

"Berger told me that he was very well acquainted with Dr. Victor Goytia and that, as a matter of fact, he had done legal work for Engraw and was

(Testimony of G. Fred Berger.)

thoroughly familiar with the glucose situation so that he would not anticipate any difficulty in working this out with Dr. Goytia.

“C. W. METCALF.

CWM:MRT”

Mr. E. B. Stanton: I will make the same offer on Exhibit 55-N from the deposition, memorandum from Metcalf referring to a conversation with Mr. Dichter.

The Court: All right.

Mr. Bronson: The same objection goes to these documents, if your Honor please, by the defendant.

The Court: Overruled. It may be received. The Exhibit 55-N attached to the deposition will be received into evidence and marked Plaintiff's Exhibit 39. That is a three-line letter. The identification is at the bottom left side.

The Clerk: Plaintiff's Exhibit 39 in evidence.

PLAINTIFF'S EXHIBIT 39

Reads in words and figures as follows, to wit:

“RTH:

I talked to Mr. Dichter who was in B. A. and he gave me a favorable report regarding the glucose situation there. Will discuss this with you on Monday.

CWM,

(initialed) CWM.

4 PM Wed 7/3/46”

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: Now, we make the same offer with reference to the memorandum entitled Statement for Dichter: dated June 24, 1946, which is Plaintiff's Exhibit 45-N for identification in the Heymsfeld deposition.

The Court: All right.

Mr. Bronson: Is that the letter of September 20th?

Mr. E. B. Stanton: 45-N, that is that memorandum.

Mr. Bronson: I make a further special objection, if your Honor please, that is a self-serving document which contains no information of any assistance to even their own theory.

Mr. E. B. Stanton: That could not be self-serving. It was not written by us.

Mr. Bronson: I have one marked 45-N signed by Berger. [262]

The Court: This is 48.

Mr. Bronson: 45-N.

Mr. E. B. Stanton: This is 48-N.

Mr. Bronson: This is 45-N.

Mr. E. B. Stanton: I am sorry.

The Court: That is already in. That is just a single line. This is a long one, Statement for Dichter, signed "Hiram Walker," is that it? Is that a signature or what? It says "Alcohol Hiram Walker."

Mr. E. B. Stanton: I think that is reference to something else.

(Testimony of G. Fred Berger.)

The Court: To something else.

Mr. Bronson: I was under a misapprehension as to the exhibit.

The Court: This is a statement. Overruled. It may be received. Exhibit 48-N attached to the deposition will be received as Plaintiff's Exhibit—

The Clerk: Is it 48 or 45-N?

The Court: 48-N. That is an "8" as I get it.

The Clerk: It will be Plaintiff's Exhibit 40 in evidence.

PLAINTIFF'S EXHIBIT 40

Reads in words and figures as follows:

June 24, 1946.

"Statement for Dichter:

"During the month of May Schenley thought they would require a very large quantity of glucose. Personnel on the Pacific Coast negotiated with Whipple, a Los Angeles broker, with CIA. Engraw Commercial & Industrial, S. A. (address: San Martin 329, Buenos Aires) for 1,135 tons of Argentine glucose, the price to be 1.375 pesos per kilogram, C.I.F. Los Angeles. This figures out 0.22293c per lb. f.o.b. Los Angeles, including 2c duty. The above for shipment as follows:

"Terms—Sample to be approved, letter of credit for the full value to be opened in favor of Engraw. The same was never submitted and the credit was never opened and it develops that Schenley does

(Testimony of G. Fred Berger.)

not need this material. Therefore, we asked for cancellation of any responsibility due to negotiations. Engraw appears willing to cancel but is asking 2c per pound to cover loss.

I suggest you proceed to Buenos Aires immediately to learn the following:

- (1) The present situation and price of glucose in the Argentine.
 - (2) Is glucose in short supply?
 - (3) Is export license required?"
-

Mr. E. B. Stanton: I now offer from the same deposition Plaintiff's Exhibit 54-N for identification, [264] being the wire to Metcalf signed Dichter. I may state that I am now covering some wires and matters that were not demanded in the statement for genuineness. These were attached to the deposition and have been referred to in the testimony.

The Court: All right.

Mr. Bronson: The same objection, if your Honor please, as previously stated.

The Court: Overruled. It may be received as Plaintiff's Exhibit now, Plaintiff's Exhibit 55-N (54-N) attached to the deposition received as Plaintiff's Exhibit 41.

Mr. Bronson: I misunderstood again. Are you offering No. 54-N?

The Court: This is 54, Dichter's short cablegram.

Mr. Bronson: A short cablegram, very well.

The Clerk: This is Plaintiff's Exhibit 41 in evidence.

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT 41

Reads in words and figures as follows:

Recd July 26/952

“Vsshlenley NY GA

This Mackay Radio 852 AM

TWX-4/RJW874

Rio 26/25 25 1027 P

LC CW Metcalf Schenley

350 Fifth Ave New York

Please wire money citibank Rio pronto will call
Monday important discuss Baires situation fear
misunderstanding costly.

DICHTER.

End at 854 AM

ACK PLS

Msg red OK end”

Mr. E. B. Stanton: I now offer in evidence from
the same deposition Plaintiff's Exhibit 37-N, being
a cable to Engraw signed Schenley Metcalf.

The Court: All right. Objection to this?

Mr. Bronson: Yes, your Honor.

The Court: Overruled. It may be received,
Plaintiff's Exhibit 42.

The Clerk: It will be Plaintiff's Exhibit 42, your
Honor.

The Court: It is No. 37-N to the deposition. It
is a one-line cable.

The Clerk: That will be Plaintiff's Exhibit 42 in
evidence.

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT 42

Reads in words and figures as follows, to wit:

“New York 7/3/46

“CIA. Engraw Commercial & Industrial, S.A.
San Martin 329

Buenos Aires, Argentina

Our representative E. R. Dichter will call at your
office tomorrow.

SCHENLEY,
METCALF.” [266]

Mr. E. B. Stanton: Next, a cable of date July 10
to Dichter, signed Schenley Metcalf in the deposi-
tion Plaintiff's Exhibit 53-N.

The Court: Subject to the usual objection, which
is overruled, the exhibit will be received as Plain-
tiff's Exhibit 43.

The Clerk: That is Plaintiff's Exhibit 43 in evi-
dence.

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT 43

Reads in words and figures as follows, to wit:

“Western Union

July 10, 1946

Cablegram

Mr. E. R. Dichter

Alveahotel

Buenos Aires, Argentina

Unable make connection today will telephone Engraw two oclock tomorrow.

SCHENLEY METCALF.

GWM:MRT”

Mr. E. B. Stanton: Now I offer 51-N from the deposition.

Mr. Bronson: The same objection, if your Honor please.

The Court: Subject to the same objection, which is overruled, it will be received as Plaintiff's next exhibit.

The Clerk: Plaintiff's 44 in evidence. [267]

PLAINTIFF'S EXHIBIT 44

Reads in words and figures as follows, to wit:

“New York 7/3/46

“Mr. E. R. Dichter

Alvearotel

Buenos Aires, Argentina

Your position is we have no contract stop Date

(Testimony of G. Fred Berger.)

of original negotiation May 23, 1946 stop Difference
in price figuration probably exchange basis .29778
per peso.

METCALF."

Mr. E. B. Stanton: I next offer 52-N from the
deposition.

The Court: Any objection?

Mr. Bronson: Yes, your Honor.

The Court: Subject to the same objection, which
is overruled, it may be received.

The Clerk: Plaintiff's Exhibit 45 in evidence.

PLAINTIFF'S EXHIBIT 45

Reads in words and figures as follows, to wit:

"NLT 176 Baires 17 9

NLT CW Metcalf Schenley 350 Fifthave NY

Please phone me retiro 8311 Engraw tenth four
oclock.

DICHTER.

Sent 4 cable 824 a pse ack" [268]

Mr. E. B. Stanton: The same offer in respect to
50-N from the deposition.

Mr. Bronson: 50-N?

Mr. E. B. Stanton: 50-N is the number.

The Court: Overruled. It may be received.

The Clerk: Plaintiff's Exhibit 46 in evidence.

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT 46

Reads in words and figures as follows, to wit:

“New York 7/2/46

“Mr. E. R. Dichter

Alvearotel

Buenos Aires, Brazil

Please telephone me.

C. W. METCALF.”

Mr. E. B. Stanton: I now offer Plaintiff's 33-N from the deposition.

The Court: Subject to the same objection, which is overruled, and it may be received.

Mr. Bronson: Yes, your Honor.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 47 in evidence.

PLAINTIFF'S EXHIBIT 47

Reads in words and figures as follows, to wit:

“June 11, 1946.

“File Memorandum:

I talked to Mr. Whipple regarding Argentine glucose. I asked him to what extent he and his principals were obligated at the present moment. He stated that they had bought 1,135 tons on our

(Testimony of G. Fred Berger.)

authorization and had paid for the first fifty tons which was on dock ready for shipment at Buenos Aires. I read the following paragraph to Mr. Engraw, which was contained in a cable received yesterday from Engraw: If You Don't Desire Coverage Will Liquidate But If Loss Occurs Must Protect Our Interests . . . I asked Mr. Whipple to call Engraw on the telephone at our expense to determine what the loss would be in liquidation of both the fifty tons ready for shipment as well as the balance of the contract. Mr. Whipple promised to get Engraw on the 'phone as soon as possible and call me back tomorrow. I told Mr. Whipple that we regretted this confusion regarding this matter and that it was not our intention to cause either him or his principals any out-of-pocket expense.
CWM:MB''

Mr. E. B. Stanton: Next, 38-N from the deposition.

The Clerk: Is this admitted, your Honor? [270]

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 48 in evidence.

Mr. Bronson: Is that 38-N?

The Clerk: 38-N.

Mr. Bronson: We understood that that goes in over objection, your Honor.

The Court: The usual objection and it is overruled.

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT 48

reads in words and figures as follows, to wit:

“Inter-Office Memorandum

“July 11, 1946.

“I talked over the telephone this afternoon with Mr. Berger, one of the owners of Engraw Company, Buenos Aires, Argentina.

Engraw made a firm contract for the 1135 metric tons of corn syrup. They agreed to open letter of credit, expecting Schenley to open credit in their favor. They are in default of this contract since they have failed to open credit. They have taken delivery and paid of their own funds for 50 tons of this corn syrup and will take another 160 tons before August 1.

Engraw find themselves in a tight spot since they registered this contract with the Chamber of Commerce and are now in violation. Both their reputation and the reputation of Schenley is in jeopardy.

Berger stated that there is no question in his mind about it costing approximately \$31,000 to cancel this contract.

Engraw's profit on this transaction was to have been approximately \$15,000.

Whipple's profit on this transaction would have been in the neighborhood of \$22,000.

Berger seemed very reasonable over the telephone and was not antagonistic or threatening in

(Testimony of G. Fred Berger.)

manner. He is decidedly worried and he hopes that we can adjust this matter promptly on a basis that would preserve his reputation in the Argentine.

“C. W. METCALF.

CWM:MRT”

Q. (By Mr. E. B. Stanton): Mr. Berger, I believe you stated, did you—or did you—that following September the 20th that you returned to Argentine? A. That is right.

Q. That is correct? A. Yes, sir.

Q. Did you have any further transactions with reference to this 1135 tons or 1,535 tons of glucose once you returned to the Argentine? [272]

A. Having received the result of our meeting with Mr. Heymsfeld on September 4th—

Mr. Bronson: I can't hear you.

Mr. E. B. Stanton: Speak a little louder, please.

A. I am sorry. I say, having received the result of our meeting with Mr. Heymsfeld as of September 4th, and having then written my letter of September 18th, there was nothing left for us to do except to see what arrangements we could make with the suppliers either to pick up the glucose or to compromise it or to do whatever was possible.

Mr. Bronson: I move to strike that out, the part that there was nothing left for us to do, with

(Testimony of G. Fred Berger.)

certain alternatives, as a conclusion of the witness.

The Court: Yes; that will be stricken. I think that is one question that can be answered yes or no.

He is giving you the reasons. He asked you if you did anything and the answer is no, not the reason why. We have already heard the negotiations which you had.

Q. (By Mr. E. B. Stanton): You had no further negotiations with Schenley Corporation, is that correct? A. No.

Q. All right. What did you do in respect to the glucose yourself after you returned to Argentine?

A. We immediately made contact with the suppliers to [273] discuss the matter of the undelivered glucose, we having at that time taken up our commitments to the extent of 351.7 tons, and about October 9th we offered them a compromise of 20 cents a kilo which they refused. We then took the steps at the same time to attempt to sell the glucose in accordance with our letter of September 18th in all points of the world wherever there was a market for glucose. I have a file——

Q. Now, Mr. Berger, in that respect will you detail just what you did in your efforts to sell this glucose?

A. Well, we sent cables and letters to Sweden, to Holland, to Italy, to Switzerland, to Manila, to Bombay, and every other point where there might have been a market for glucose. We also attempted

(Testimony of G. Fred Berger.)

to deal with people in Sao Paulo in Brazil who had further contacts which we did not have. Well, we practically canvassed the world in an attempt to get rid of the balance of the glucose. I have a file here, incidentally, that shows those better than I can describe them, if it means anything to you.

Q. Well, if it will refresh your recollection relative to what you did and give us further details.

The Court: I do not think the details are necessary. I think as long as he tells what he did it is sufficient. I do not know whether you are required to go into details.

Q. (By Mr. E. B. Stanton): As a result of these [274] negotiations which you say you made were you able to dispose of any of the glucose?

A. Eventually we made a contact with Chocolad Fabricken Merabau in Sweden and disposed of not only the 351 tons which we had picked up out of our commitments, but about 120-odd tons of one of the other suppliers.

Q. Is that the only portion of the shipments that you were able to sell?

A. Yes. We were able, as I said, originally testified to originally, we made an offer of 20 centavos a kilo which then was not agreed upon. The whole matter, in accordance with the contracts and the procedure under the Bolsa De Commercio or the stock exchange, if you will, was then subjected to arbitration, and the arbitration, without proceeding the months of January and February, and

(Testimony of G. Fred Berger.)

finally, just as decisions on the arbitrations were—well, may I correct myself, please?—proceeded through the months of December, January being a court holiday there was no procedure in January, and then through February and part of March, at which time we then arranged, just about the time the arbiters were ready to give their decision and the litigation was getting under way, fully under way, the suppliers then accepted our original offer of compromise of 20 centavos a kilo.

Q. Was that 20 centavos the only consideration that [275] you were to pay, Mr. Berger? You mentioned 20 centavos. Was that the only consideration you were to pay?

A. 20 centavos per kilo on all of the undelivered portion.

Q. Was that the only obligation that you undertook?

A. We signed an agreement with the suppliers, if that is what you mean. I don't quite understand.

Q. By the way, Mr. Berger, when did this Swedish sale take place?

A. As I recall it, the negotiations were under way, I think, in late March, and the consummation was in April, or either in late April and the consummation was in May. I am not quite clear as to the months and I have nothing to tie it into. I was just trying to remember something that I could tie the dates in, but I can't do it now.

Q. Of 1947?

A. Of 1947.

(Testimony of G. Fred Berger.)

Q. Prior to that time you had been able to dispose of no glucose? A. That is right. [276]

Q. (By Mr. E. B. Stanton): By the way, Mr. Berger, did you ever pay that tax on your application for export permits?

A. Yes. Our applications for export——

Q. Just a minute. When did you pay the tax?

A. About around November 6th, 1947, because at that time we wanted our export licenses.

Q. And did you receive your export licenses?

A. We did.

Q. Based upon the same application that you had made in May? A. That is right.

Q. I ask you if you can identify these documents?

A. Yes. These are the export licenses in question.

Mr. E. B. Stanton: I now offer these as a group exhibit.

Mr. Rowe: Let me see them, please.

Mr. E. B. Stanton: Haven't you a photostatic copy?

Mr. Rowe: We have no photostatic copy.

Mr. L. B. Stanton: You did have them. We furnished you with photostatic copies.

Mr. Rowe: I don't see them here.

Mr. L. B. Stanton: Well, we furnished them to you.

Mr. Rowe: We asked for it but we did not get it. We got the application——

(Testimony of G. Fred Berger.)

Mr. Bronson: They aren't among the documents which [277] you supplied us with.

Mr. E. B. Stanton: I offer these export permits in evidence.

The Court: All right.

Mr. Bronson: We will object to the admission of those documents, on the grounds that they are incompetent, irrelevant and immaterial.

The Court: All right. The objection is overruled.

Mr. Bronson (Continuing): In view of the last testimony of the witness, as to how that transaction was handled, how the entire amount that they are claiming for was disposed of.

The Court: Well, objection overruled.

The Clerk: Plaintiff's Exhibit 49 in evidence.

The Court: Do you offer those three as one exhibit?

Mr. E. B. Stanton: One group exhibit.

The Court: All right. I think we better put the contents in: These three exhibits refer to the number of the application for license already in evidence, 192.468, 202.501 and 202.502. They are entitled Permission to Export. They give the name of the company as the plaintiff here, and the first one is for 935,000 kilos of corn glucose, liquid crystallized, in wooden kegs; value 1,215,500; dated November 7, 1946; the authorization expires on February 5, 1947. [278]

On the inside page, it recites the request of the export firm of Engra, they are handed a copy of

(Testimony of G. Fred Berger.)

the permit D-11.210 of this date, the date of November 7, 1948, corresponding to the export application number 192.468 of 27-5-46. The only object of showing them to the legal judicial authorities of the United States of America, dated August 29th, Buenos Aires, signed by Hector A. R. Alfonso, Director of Import and Export, and then there is a certificate by Jose Constantino Barro, Secretary of Internal Industry and Commerce. It certifies that the signature is that of Dr. Alfonso, Doctor of Export and Import of this Secretariat. Then, there is an additional authentication by the Secretary of the Exterior, Foreign Office.

In addition to that, there is another certification that the seals and stamps correspond to the application.

Then, there is a certification by the American Embassy to the Vice Consul that the seal and the signature of Diaz and the seal of the Ministry of Foreign Affairs are genuine.

The second one is identical in substance, except that it refers to 200,000 kilos of a value of \$260,000.00 dated in November, dated the same day. The expiration date is also the same, the 5th of February, 1947.

The third one is in substance the same and relates to 400,000 kilos at a price of 528,000 pesos; dated the same date, November 7, 1946, and the expiration date given as [279] February 5, 1947.

All right. Have you any more?

Mr. E. B. Stanton: Yes, I have one.

(Testimony of G. Fred Berger.)

Q. Now, Mr. Berger, I show you what purports to be an original document of four pages clipped together, a document entitled Free English Translation, and see if you can identify that?

A. Yes, sir. This is the document and translation of the agreement entered into between the suppliers and the company Ingraw.

Q. Do you know who made, who prepared the free English translation?

A. Yes, the office of Dr. Goytia.

Q. In South America?

A. Yes, sir, the attorney.

Q. And do you recognize the signature hereon, on the face of the document?

A. These are merely identifying pages. The signatures are on the fourth page. Yes, I recognize these signatures.

Q. Those are the signatures of the suppliers, are they? A. Yes.

Q. And of yourself? A. That is right.

Mr. E. B. Stanton: I now offer this in evidence.

Mr. Bronson: I am going to ask to have the last answers [280] read, as I did not hear them. Mr. Rowe and I have the same trouble and I don't think we are deaf. It is just that the witness lets his voice drop.

(Record read by reporter.)

The Court: He was identifying the signatures.

Mr. Bronson: All right, thank you, Judge.

The Court: And he said it was made by Dr. Goytia.

(Testimony of G. Fred Berger.)

Mr. Bronson: And I want to say we haven't seen this document before, although we asked to put it in a deposition about a week ago and counsel unfortunately neglected to make a carbon for us.

The Court: All right. I see.

Mr. E. B. Stanton: I have provided counsel with a photostat of the Spanish. I don't have another carbon of the free English translation.

The Court: All right. It may be received.

Mr. E. B. Stanton: I offer a photostatic copy of the document referred to, together with the translation.

The Court: Are you objecting to this?

Mr. L. B. Stanton: You can have a copy of the translation made for you.

Mr. Bronson: Thank you very much.

The Court: Is there any objection to this?

Mr. Bronson: No objections, your Honor.

The Court: This is merely an award on the arbitration. [281]

Mr. Bronson: I did not understand it was such. I understood it was an agreement entered into between the parties.

Mr. E. B. Stanton: That is right.

Mr. Bronson: It is not an award. I think the evidence is that a compromise was effected between the parties.

The Court: Well, I shouldn't have said "arbitration." It is a compromise agreement. All right. It may be received.

The Clerk: Plaintiff's Exhibit 50 in evidence.

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT 50

Between Compania Engraw Comercial e Industrial S.A., hereinafter named "Engraw," on the one hand, and S.I.F.A.R. S.A., R. H. Gonzalez y Cia. S.R.L., Auge Freres y Cia., and Eugenio Lang S.R.L., on the other hand,.....
And Whereas.....

A) "Engraw" signed the contracts for the purchase of glucose hereinafter described:.....

Two Contracts With SIFAR S.A., drawn up on printed forms numbers 29.563 and 30.854 of the Stock Exchange of Buenos Aires, whereby SIFAR S.A. sold to "Engraw" and the latter acquired in ownership Six Hundred (600) and Four Hundred (400) tons respectively, of glucose, quality and price as specified in said instruments.....

One Contract with R. H. Gonzalez y Compania S.R.L. drawn up on printed form number 30.619 of the Stock Exchange of Buenos Aires, whereby R. H. Gonzalez y Compania S.R.L. sold to "Engraw," and the latter acquired in property, Two Hundred (200) tons of glucose, quality and price as specified in said instrument.....

One Contract with Auge Freres y Cia, drawn up on printed form number 30.288 of the Stock Exchange of Buenos Aires, whereby Auge Freres y Cia. sold to "Engraw" and the latter acquired, Seventy Five (75) tons of glucose, quality and price as stipulated in said instrument.....

(Testimony of G. Fred Berger.)

One Contract with Engenio Lang S.R.L. drawn up on printed form No. 30.132 of the Stock Exchange of Buenos Aires, whereby Eugenio Lang S.R.L. sold to "Engraw" and the latter acquired, Fifty (50) tons of glucose, quality and price as stipulated in said instrument.....

B) And Whereas Compania Engraw Comercial e Industrial S. A., declares that said contracts were signed by Companie Engraw for the purpose of complying with some purchase contracts which the latter in turn had entered into with Schenley Distillers Corporation of New York (San Francisco branch).

C) And Whereas Compania Engraw declares that it was compelled to interrupt the receipt of the merchandise acquired from SIFAR S. A., R. H. Gonzalez y Compania S.R.L., Auge Freres y Cia, and Eugenio Lang S.R.L., on account of Schenley Distillers Corporation having broken unexpectedly and without any valid reason whatsoever, the above-mentioned contract entered into with Compania Engraw

D) And Whereas as a consequence of said breach of contract, as declared by Compania Engraw, the latter was compelled to institute against Schenley Distillers Corporation, an action for recovery of damages, said action is pending with the Federal Court of the City of Los Angeles, United States of America under the following caption: "Com-

(Testimony of G. Fred Berger.)

pania Engraw Comercial e Industrial vs. Schenley Distillers Corporation." On the other hand, SIFAR S. A., R. H. Gonzalez y Cia. S.R.L. Auge Freres y Cia. and Eugenio Lang S.R.L., without acknowledging the truth of the declaration made under B), C) and D), have acquiesced to enter into an Agreement with Compania Engraw Comercial e Industrial S.A. under the following conditions:

Article First: Compania Engraw Comercial e Industrial S.A. shall pay to SIFAR S.A., R. H. Gonzalez y Cia. S.R.L., Auge Freres y Cia., and Eugenio Lang S.R.L. \$0,20 Arg. Cy. (Twenty Cents Argentine Currency) per Kilo of the Glucose which Engraw failed to receive from the above-mentioned sellers. Said payment shall be considered a total compensation for the total and final cancellation of the above-mentioned contract. Said cancellation shall become effective after the above-mentioned payment is made, and providing same is effected within the term hereinafter stipulated.....

Article Two: The payment referred to in the preceding Article shall be made by Compania Engraw Comercial e Industrial within the term of Forty (40) working days as from the date of this agreement. This term shall mature automatically, there being no judicial or extra-judicial intervention required.....

Article Three: Said payment shall be made by

(Testimony of G. Fred Berger.)

Compania Engraw Comercial e Industrial with funds furnished by Cia. Engraw Export and Import Co. S.A., with domicile in Montevideo, Uruguay through the law office of Dres. Goytia. For these purposes the Central Bank of the Argentine Republic shall be requested for the pertinent authorization to import these funds into Argentina. Nevertheless, it is specifically stipulated that this article shall not modify the term fixed in the preceding article; therefore, the transfer of funds must be obtained within the agreed term of forty (40) working day, and under no circumstances whatsoever may the fact of not having obtained the transfer, or not having secured the authorization of the Banco Central alter said term.....

Article Fourth: During said term of forty (40) working days granted in Article Two, SIFAR SA. R. A. Gonzalez y Cia, S.R.L., Auge Freres y Cia, and Eugenio Lang S.R.L. shall keep in full force all the claims and actions they have at present against Cia. Engraw Comercial e Industrial S. A. binding themselves only to refrain from instituting any legal action whatsoever during said term, except the prosecution and completion of the arbitration proceedings pending before the Stock Exchange of the City of Buenos Aires.

Article Five: After the payment of \$0.20, Arg. Cy. (Twenty Cents Argentine Currency) per kilo of glucose not received, mentioned in Article One, within the term agreed in Article Two of this con-

(Testimony of G. Fred Berger.)

tract, the four vendor companys undersigned, SIFAR S. A., R. H. Gonzalez y Cia. S.R.L., Auge Freres y Cia., and Eugenio Lang S.R.L. shall consider all the purchases specified in the above-mentioned contracts (number: 29.563, 30.854, 30.619, 30.288 and 30.132), cancelled as far as the quantities not received up to this date are concerned; likewise, all the right and obligations emerging from said contracts shall remain without effect for the uncomplished with part of same, and shall be reciprocally released in full, except for the stipulations of the following article.

Article Sixth: Engraw binds itself to give participation in any sum recovered as a result of the lawsuit pending against Schenley Distillers Corporation, mentioned in D), either by final decision of the Court or by extra-judicial settlement, to SIFAR S.A., R. H. Gonzalez y Compania S.R.L., Auge Freres y Cia, and Eugenio Lang S.R.L., under the following conditions: From the total amount obtained by Compania Engraw the following deductions must be made:.....

a) In the first place, Seventy Five Thousand Dollars U.S. Cy. This amount is destined to the reimbursement to Engraw of the payments the latter shall effect to SIFAR S.A., R. H. Gonzalez y Compania S.R.L., Auge Freres y Cia., and Eugene Lang S.R.L., in accordance with Art. 1 and of part of the losses suffered by Engraw in other respects, as a result of this matter.

(Testimony of G. Fred Berger.)

b) In the second place a deduction shall be made for the amount of the actual and proved expenses suffered by Engraw in the handling of the above-mentioned lawsuit (costs, expenses, fees, etc.).....

.....These two items having been deducted, the net balance shall be distributed among Compania Engraw SIFAR S.A., R. H. Gonzalez y Compania S.R.L., Auge Freres y Cia., and Eugenio Lang S.R.L., in proportion to the amount of tons of glucose that each one of them has on hand at present, and which correspond to the above-mentioned contracts, same being the following:

Compania Engraw.....	451.7 tons
SIFAR S. A.....	800 tons
R. H. Gonzalez y Compania S.R.L.....	158.3 tons
Auge Freres y Cia.....	75 tons
Eugenio Lang S.R.L.....	50 tons

Total1.535 tons

.....Consequently, it is expressly and clearly agreed, that in case a lower amount than that stipulated in (a) and (b) is obtained from Schenley Distillers Corporation, i.e., Seventy Five Thousand Dollars U.S. Cy., plus the expenses derived from the handling of the lawsuit pending between Compania Engraw and Schenley Distillers Corporation, then nothing shall be payable by Compania Engraw to SIFAR S. A., R. H. Gonzalez y Compania S.R.L., Auge Freres y Cia. and Eugenio Lang S.R.L., as regards the provisions mentioned in this Article.

(Testimony of G. Fred Berger.)

Article Seven: If possible, Compania Engraw shall consult with the other interested parties before entering into any arrangement or settlement with Schenley Distillers Corporation.

Article Eight: Compania Engraw binds itself to make use of any legal recourse that may be pertinent against unfavourable judicial decisions which may be handed down in connection with said lawsuit, except those which in the discretion of Engraw do not correspond or which would only result in unnecessary expense. In the case that Engraw considers some recourse is not justified, it shall inform accordingly the other parties subscribing this instrument, who may insist on filing same, and if so all the expenses and fees arising from said step shall be for their account.

Article Nine: Engraw shall deliver a copy of the action instituted against Schenley Distillers Corporation to the law office of Dr. Beccar Varela, likewise sending the latter, every ninety days, a report on the progress of the lawsuit.

In witness whereof the parties sign five identical copies of this document, one for each of the subscribers, in the City of Buenos Aires, on April ninth, 1947.

The Court: All right.

Q. (By Mr. E. B. Stanton): In addition, Mr.

(Testimony of G. Fred Berger.)

Berger, to the twenty centavos, did you have any other expenses connected with the disposal of this glucose problem?

Mr. Bronson: We object to that as incompetent, irrelevant and immaterial, under any theory of damages in this case.

Mr. E. B. Stanton: I am referring to the document itself in evidence where it provides for the various expenses to which he has gone.

Mr. Bronson: I know, but in admitting it, in allowing it to be admitted without objection we are not agreeing that the memorandum sets up an arrangement between other parties whereby they specify what is in and what is out as expenses, for damages.

The Court: I don't know what—what are you trying [282] to elicit?

Mr. E. B. Stanton: Well, merely the items on damage to which the plaintiff corporation has actually suffered, inclusive of legal expenses, various other expenses connected with the whole transaction, all of which reacted to their damage.

The Court: Let me read your complaint and your pleadings here.

Mr. L. B. Stanton: I may state, we take the definite position on that, that it would be the difference between the contract price and the market price, and I don't think it is a matter of pleading any cash moneys outlaid.

Mr. Bronson: While you are bringing that up,

(Testimony of G. Fred Berger.)

if we are not interrupting your Honor's train of thought——

The Court: On damages, you can't take an inconsistent position.

Mr. L. B. Stanton: That is right.

The Court: You have to use a criterion.

Mr. L. B. Stanton: Well, that is our position, your Honor.

The Court: And if you are taking the position that you are entitled to a different market price, it is not a question of general damages—I mean it is not a question of special damages.

Mr. E. B. Stanton: I will agree with your Honor on [283] that.

The Court: And you haven't pleaded any special damages.

Mr. L. B. Stanton: And we haven't pleaded any special damages.

Mr. Bronson: Let me make this point: That Exhibit B says you are going ahead to dispose of that glucose. This is the dispute they proved that they went in there and compromised and set a figure for their loss.

Mr. L. B. Stanton: That is not the point.

The Court: That is a question of law to be determined. I am merely going into the criterion of damage. Any special damages such as expenses are not material and on that basis I will sustain the objection.

Mr. L. B. Stanton: I made that point specifi-

(Testimony of G. Fred Berger.)

cally because we knew Mr. Bronson was going to bring up a thing like that.

The Court: It is nice to know your opponent.

Mr. Bronson: It is nice to have that clear-minded ability, and he has misquoted me there.

Mr. L. B. Stanton: Pardon me.

The Court: All right.

Mr. E. B. Stanton: Nothing further from this witness, at this time.

The Court: All right. This is a good time to quit. We will adjourn until tomorrow morning at 10:00 o'clock. [284]

(Whereupon, an adjournment was taken until Thursday, June 3, 1948, at 10:00 o'clock a.m.) [285]

Thursday, June 3, 1948

G. FRED BERGER

(Recalled)

Cross-Examination

By Mr. Bronson:

The Court: Proceed.

Q. (By Mr. Bronson): Mr. Berger, you testified yesterday that in connection with your application for export licenses you did not put up the tax which was applicable to those for the reason that the letter of credit that you understood would be forthcoming had not been posted as yet, is that true?

A. Yes, sir.

(Testimony of G. Fred Berger.)

Q. It is true, is it not, though, prior to that date it purchased 50 tons of glucose on this transaction on your own credit?

A. No. The 50 tons were purchased the early days of June.

Q. In the early days of June? A. Yes.

Q. Are you certain about that?

A. I am quite certain.

Q. Well, you did that, in other words you posted your own credit for the 50 tons at the time that you were withholding the placing of the tax so that the permits would be [309] issued—correct?

A. Yes. It was part of our commitments under our contracts.

Q. Did you ship that 50 tons?

A. No, sir.

Q. You testified about the rate of exchange, Mr. Berger, and made a distinction yesterday between free exchange and the controlled exchange having to do with the export of Argentine commodities. Do you recall that testimony?

A. Yes, sir.

Q. And you say the rate is 25 centavos—I mean four pesos to the dollar in free exchange and the pegged or controlled exchange on this commodity was 3.3582? I may be a little in error there.

A. 3.3582 is correct.

Q. Yes. In other words, if I went down there myself with \$100 in American money today, I could go into the bank and secure 400 pesos, could I not, on that exchange or thereabouts?

(Testimony of G. Fred Berger.)

A. Approximately, yes, sir.

Q. And then if I wanted to divert that into the purchase of glucose for my own use down there that was not in export, I could purchase it without the application of the special or controlled price?

A. Do you mean if you had the pesos yourself?

Q. Yes.

A. It was an intra-country transaction?

Q. Yes. A. That is correct.

Q. The export price on Argentine glucose was \$1.23, that is, one peso and 23 centavos to one peso and 25 centavos in the month of August of 1946, was it not?

A. That would be a little bit difficult to know the exact money when that happened.

Q. I asked you about that in your deposition. Do you recall it?

A. Yes. It could be because at that time the price situation was more or less nominal.

Mr. Bronson: If it is not objectionable to you, I will read this and you can tell me if it is a correct statement. I am reading from page 102 of the deposition. You can follow me here if you prefer.

Mr. E. B. Stanton: All right.

Q. (By Mr. Bronson):

“Q. On August 2nd,”

on the next to the last page, that is the page immediately preceding one that contains your signature, we were referring to that letter, in the third from the last paragraph, reading:

(Testimony of G. Fred Berger.)

“In view of the fact that the Government just at this time has been delaying the issuance of export permits in its fight to reduce the local cost of living, there has been practically no activity in the glucose market which has remained steady at 123-125.”

A. Yes; that was the nominal market because of recent activity on the market.

Q. Well, that was the market in any event?

A. It was the nominal market.

Q. Let us put it this way: The market is made up of quotations, isn't it, on the exchange where the commodity is handled?

A. Mr. Bronson, a market is made up wherever it is, sometimes on active quotations, sometimes on bid and asked when there is only nominal activity. This happens to be nominal activity and it is in effect a bid and asked quotation, 123-125 being the asked quotation.

Q. That would mean that that was the asked quotation——

A. That is right.

Q. ——or the lower one was the bid——

A. 123-125 was——

Q. If you will excuse me—and the higher, the asked quotation?

A. That is not bid and asked.

(Interruption by the reporter.) [312]

The Court: Just a moment. You see, I sensed that. Either stop when counsel is talking, or, rather, begin when counsel has stopped. Let us get back and see what it is.

(Testimony of G. Fred Berger.)

(Record read by the reporter.)

The Court: Is that a question?

Mr. Bronson: That is a question.

The Court: You answer that question and then we will get back. [313]

A. That is not a bid or ask. That is the range of the asked quotation at the time.

Q. (By Mr. Bronson): All right, and there was no other market on export glucose than that particular figure set in the manner you have described, is that true? A. That is true.

Q. Now, isn't there, in fact, a difference between your domestic bulk market on glucose and the export market?

A. Yes, that is quite right.

Q. And you were talking and you intend now to testify that this figure that I just read to you—that range of figures applies to the export market, correct? A. That is correct.

Q. Carrying on further in the reading of this thing and to bring out that point, stopping you there, "Was that the export price or the domestic price?" That is my question of you in the deposition. Your answer: "I have already testified as to that this morning. I said in this particular statement there, there should have been inserted the word 'export' "

The Witness: That is right.

Q. (By Mr. Bronson): Now, the domestic bulk market was not the same as the export market, that is correct?

(Testimony of G. Fred Berger.)

A. No. That is correct.

Q. And there is quite a substantial difference, is [314] there not? A. That is right.

Q. And that is explainable, is it not, Mr. Berger, by the fact that you have a pegged price in exchange, that is, a pegged exchange on glucose that goes into foreign trade?

A. No. Your explanation isn't correct for that. The pegged exchange rate has absolutely nothing to do with the price of glucose, either for export or otherwise. The difference between the price of glucose for export and the price of domestic glucose is this: Domestic glucose is priced much lower than the export price and the Government permits a much higher price, a much higher quotation for export glucose for any country, not just the United States, to offset the local prices at which local glucose is sold.

Q. Can you supply the Court with any formula on the difference between the two, the domestic and the export prices?

A. I am not sure what you mean by formula?

Q. Well, the percentage, the differential between the two prices, as a normal or an average matter.

A. That I could hardly do, because that is done by the officials and I have no way of knowing how they arrive at that.

Q. Well, does it differ as much as 50 per cent. that is, the domestic price from the export price?

(Testimony of G. Fred Berger.)

Mr. L. B. Stanton: I would object to this line of examination, that Mr. Berger was not qualified as a market expert.

The Court: Well, he can answer. He can answer. You may answer, if you can. If not, he may say so.

The Witness: I am delaying only because I am trying to remember what might have been the case.

I am afraid I don't feel qualified to answer the question of differences, because they are not our figures. We are interested only in the export glucose.

Q. (By Mr. Bronson): When you are interested in export glucose, Mr. Berger, and are purchasing for export glucose, you are in competition with the market for local glucose, are you not?

A. I would say not insofar as an organization such as ours is concerned. The suppliers who make a specialty of that type of business would possibly be.

Q. Well, what you want to tell me is that I will have to content myself with the statement that there is a great difference between the domestic glucose market and the export glucose market and that you can't go further and give us some figure or fraction representing that great difference in the two prices? Do I understand you correctly?

A. That is correct.

Q. Now, I am referring you to Exhibit A and rather [316] than run back and forth as I did yesterday and the day before and got very tired doing

(Testimony of G. Fred Berger.)

it, Mr. Berger, I will read you one or two of these wires and if you want to look at them rather than content yourself with that, let me know.

The Witness: All right.

Q. (By Mr. Bronson): First is a wire from Mr. Whipple on the 20th of May, which is marked Defendant's Exhibit A. We put in Mr. Whipple's cable of that date, addressed to you, reading as follows:

"Confirming Sale 1300 Tons Glucose Accordance Offer April 24 May 29 Cable Earliest Shipping San Francisco Whose Name Credit. Can You Increase Earlier Shipments."

Mr. E. B. Stanton: May I interrupt you? You said May 29th.

Mr. Bronson: May 9th, I should have said. April 24 and May 9 are the dates.

Q. (Continuing): Now, at the time that you received that, you set about making some purchases, did you not, of glucose? A. Yesterday, yes.

Q. (By Mr. Bronson): After you received this May 20th cable?

The Witness: Which cable was this?

Q. (By Mr. Bronson): This was May 20th, from Mr. [317] Whipple to you, when he confirmed for the sale of 1300 tons?

A. No, sir. I testified that we made the actual purchases and signed the contracts on May 22nd, 23rd and 24th. Up until that time, whatever we did was more or less on option.

Q. Well, as to this 1300 tons, at the time you

(Testimony of G. Fred Berger.)

received the cable from Mr. Whipple saying that he confirmed sale of 1300 tons, you were ignorant of whom he had sold the 1300 tons to, were you not?

A. That is right.

Q. And you took it for granted and relied upon the statement that he had sold 1300 tons, did you not?

A. One would gather that from that telegram, that is correct.

Q. Well, didn't you rely on it and take it for truth?

A. We did not act on it and make any purchases.

Q. That isn't what I asked you, Mr. Berger. Did you accept it as fact?

A. Well, you are asking me about two years from the time it happened whether I accepted something as fact. Certainly we did not make purchases on the strength of that cable.

Q. Well, here is the next exhibit that I will call your attention to, Defendant's Exhibit B, cable from you on May 21st, directed to Mr. Whipple, reading: [318]

Mr. E. B. Stanton: May I suggest, Mr. Bronson, I think when he testifies with reference to these cables, there are so many—I do hate to have you go back and forth, but I think it would really be better to show them to the witness.

Mr. Bronson: I like to stay this far away from the bench. I don't like to intrude on the area of the Court.

(Testimony of G. Fred Berger.)

The Court: It does not matter. We do not stand on ceremony. When counsel is showing a document to the witness, he has permission to approach him.

Mr. Bronson: Thank you very much.

Q. (Continuing): I am showing you Exhibit B, now. Will you read that, please?

Now, that is a wire that says—I will have to take it; I am sorry. I don't have my copy of it right here:

“Subject Prior Sale Sixhundred Tons Available Price Onethirty Require Twentyfivepercent Downpayment.”

Then follows comments about delivery.

Had you purchased firm any glucose at the time that you made that wire to Mr. Whipple?

A. No, sir. The first three words would denote that.

Mr. Bronson: The next Exhibit E of defendant——

Mr. L. B. Stanton: E?

Mr. Bronson: E, yes.

(Mr. Bronson hands telegram to the witness.)

Q. Now, at the time that you transmitted this wire of May 23rd, had you made any [318] purchases on account of this transaction?

A. Yes. There is another telegram that is not in the record here on which we made our purchases. That is an answer stating that we had made the purchases, because on the receipt of the other cable we then were in a position to make these purchases and sign the contracts.

(Testimony of G. Fred Berger.)

Q. Well, I will show you now Plaintiff's Exhibit 7. Is that the one you refer to? That is the wire from you to Mr. Whipple, is it not?

A. That is right.

Q. What is the date of it? A. May 22nd.

Q. May 22nd? A. That is right.

But, there is still another wire.

Q. And that is a wire from——

A. From Whipple to us.

Q. ——from Mr. Whipple to you?

A. That is right. It must be his wire of May 21st.

Q. Well, it has been shown to you, hasn't it, in the course of these proceedings and marked in evidence? A. I believe so.

Q. Now, here, that is Exhibit C, isn't it?

Mr. E. B. Stanton: B comes first, Mr. Bronson. They are in sequence. [319]

Mr. Bronson: B?

The Witness: This is it (indicating)——

Mr. E. B. Stanton: B and C.

Mr. Bronson: I have already shown him B.

Q. I am showing you Exhibit D, that is a cable directed by Mr. Whipple——

The Witness: No.

Q. (By Mr. Bronson) (Continuing): ——to you, on the 23rd of May.

A. No. That is ours to Mr. Whipple.

Q. (By Mr. Bronson): That is yours to Mr. Whipple?

(Testimony of G. Fred Berger.)

A. That was after this (indicating document).

Q. Yes. You asked for the one from Mr. Whipple dated May 21st. Is that the one you received?

A. That is dated May 21st and received by us on the 22nd.

Q. That is the one—you made no purchases firm on his account until you received this cable that you have pointed out, that is Defendant's Exhibit C?

A. That is correct.

Q. So we understand the contents of it, I will read it: "Accept 600 Tons One Thirty," that is price, is it not?

A. That is right.

Q. (Reading): "Shipments One Hundred Fifty Monthly Will Accept Balance as Available Same Price Schenley [320] Distillers Will Open Credit Entire Amount but No Cash Deposit Try Ship During June Cable Confirmation."

Now, that is the first time that Mr. Whipple disclosed the name of the party with whom he was conducting this transaction?

A. That is correct.

Q. And it was following that, that you waived or withdrew the cash requirement and agreed to accept a letter of credit?

A. No, we did not withdraw. On receipt of that cable disclosing Schenley Distillers as the purchaser, we went—or I went, in this instance, to the supplier S.A.F.I.R., who was the one requesting the 25 per cent down payment, advising them who the purchaser was and they on the strength of the credit

(Testimony of G. Fred Berger.)

standing of the purchaser withdrew the requirement on the 25 per cent down payment.

Q. Yes. Now, did you know on the 21st of May when you received this cable from Mr. Whipple—rather, on the 22nd of May, I see that is the date, whether he had a contract for the purchase of that or not, by Schenley?

A. Did we know whether he had a private contract?

Q. Yes.

A. One would assume that from that telegram.

Q. What telegram are you referring to?

A. That (indicating). [321]

Q. The one I hold. You took the same reliance upon his statement as you did of the first cable I read to you referring to 1300 tons?

A. No. You assumed, in questioning me with regard to the first cable on 1300 pounds and suggested that I made the purchases on that and my answer was that I had not made. Following the cable on the 600 tons, he come back answering that and saying that he will accept any balance up to 1300 tons and on the basis of that telegram we were ready to act.

Q. You did not know anything other than this wire states, at the time you received this wire, as to the terms of the sale, if any sale had been made by Mr. Whipple to Schenley, that is all you knew about it?

A. That was the only information I had that

(Testimony of G. Fred Berger.)

Schenley was the purchaser. That is correct.

Q. And you testified that the exhibit, the letter of Mr. Donnelly, dated May 23rd and containing the postscript you saw for the first time in the early days of June?

A. Yes. It was sent to me with Mr. Whipple's letter of June 6th.

Q. May I take that, if you are through with it?

A. Yes.

Q. That goes in the plaintiff's file.

Will you state what experience you had with Mr. Whipple prior to May 20 of 1946 in actually closing any transactions [322] in export trade?

A. I have already stated in earlier testimony, either in my deposition or here, that our contract with Mr. Whipple up to that time had been either correspondence or cables looking toward the closing of any deals, but we had not closed any deals up until this one.

Q. In other words, for any commodity during the period that you had known Mr. Whipple, you had never had a sale confirmed by any kind of a communication until you got that cable of May 20th regarding 1300 tons?

Mr. E. B. Stanton: I object to the form of that question. It is a little confusing. That sale of 1300 tons is not what the witness acted upon, he stated he acted upon the one accepting the 600 tons.

Mr. Bronson: Well, there is another party to the communication. If it will help counsel, I will reframe it:

(Testimony of G. Fred Berger.)

Q. That is the first time, that is the receipt of this 1300 ton wire and that is dated May 20th, that you had any type of communication with Mr. Whipple whereby he confirmed a sale?

A. He did not confirm a sale—yes, he confirmed a sale on the 1300.

Q. Yes, that was the first time, wasn't it?

A. Yes. We had no other transactions completed until that time. [323]

Q. No experience at all with the way he handled himself in those transactions?

A. That would be true.

Q. Now, you were questioned by your counsel here, Mr. Berger, with regard to a conversation that you had with Mr. Heymsfeld, whom you correctly designated as the general counsel for Schenley, and that conversation took place in early September of the year 1946; do you recall that?

A. It took place on September 4, 1946. [324]

Q. Now, that took place where?

A. In the Schenley offices in New York City in the Empire State Buiding.

Q. And was Mr. Hosey and Mr. McManus there also?— A. That is right.

Q. And they are both associated in some manner with your company? A. That is correct.

Q. I want to ask you if in the course of that conversation you mentioned to Mr. Heymsfeld that your position was in coming up there that you had

(Testimony of G. Fred Berger.)

been waiting for some instructions from Schenley?

A. That is correct. But there is a memorandum that, if you want the complete memorandum, we have it available of the meeting so that you can check against that memorandum any time you wish.

Q. Well, I have a memorandum here that was secured from Mr. Heymsfeld by Mr. Mesirov, an attorney who represents you in the East somewhere, when Mr. Heymsfeld's deposition was taken. Is that the memorandum you are talking about?

A. I don't know, but there is a copy of that here so you can refer to it if you wish.

Q. If it is agreeable to counsel, I would like to read slowly and ask you if it was your understanding when that took place there—and stop me and correct me if he [325] incorrectly stated—and, counsel, that is Exhibit 59-N—if I may go ahead that way so that you understand.

Mr. L. B. Stanton: Do you expect to introduce that into evidence, Mr. Bronson?

Mr. Bronson: Yes—no. I am trying to question the witness about what happened at that meeting.

Mr. L. B. Stanton: It is suggested that you are talking about a document, and you had better introduce it into evidence. It is not in evidence at this time.

Mr. Bronson: I would rather proceed in my own way.

Mr. L. B. Stanton: We would prefer to have it in evidence.

(Testimony of G. Fred Berger.)

Mr. Bronson: You may offer it afterward. I am asking the witness about his recollection of his version.

Mr. L. B. Stanton: I object to questioning on a document which is not in evidence.

Mr. Bronson: Just a moment, if your Honor pleases.

The Court: Is that document identified at all in the record?

Mr. Bronson: Up to this point you mean?

The Court: Yes.

Mr. Bronson: No, your Honor. It happens to be one of the exhibits in Mr. Heymsfeld's deposition taken by the plaintiff in the East, not among those that were——

The Court: If it is in the deposition, if the question is to lay a foundation for facts which might lead to the [326] introduction, it is not objectionable merely because it is not in the record. If the answer is of great materiality, then counsel can request that the document be identified so that the record will show what the question related to.

Mr. Bronson: I am going to take the suggestion of counsel and offer it in evidence and then read it to Mr. Berger to see if he has any corrections to make of his understanding of what happened at that meeting.

The Court: All right.

Mr. L. B. Stanton: Then I make the objection on the grounds it is purely a self-serving document.

(Testimony of G. Fred Berger.)

Mr. Bronson: I don't think so.

The Court: Oh, no. This is an impeaching document.

Mr. L. B. Stanton: Oh, no. This is a memorandum which is made——

The Court: By the other side, that is true.

Mr. L. B. Stanton: ——by Mr. Heymsfeld.

The Court: Yes; to give another person's version and ask him if it corresponds to his. It is as though he were asked: Isn't it a fact that this is what took place? You can ask that question of a witness.

Mr. L. B. Stanton: Yes; that is true.

The Court: I think we used to call that in the old days the categorical question. The objection is overruled. This is merely introduced for the purpose of the cross-examination. [327]

Mr. Bronson: That is right. I will proceed as I suggested after your clerk has marked it.

The Clerk: Defendant's Exhibit Q.

Mr. Bronson: Will you mark that, and before you do that, may I suggest that we handle this the way we did the exhibits from the same deposition yesterday?

The Court: Yes. Don't take this copy.

Mr. Bronson: Don't take my copy. I am sorry.

The Court: Just a minute. He wants to check.

The Clerk: Defendant's Exhibit Q in evidence.

(Testimony of G. Fred Berger.)

DEFENDANT'S EXHIBIT Q

Is in the following words and figures, to-wit:

“Thursday, September 5, 1946

4:50 P.M.

Memorandum for the file

Schenley-Engraw

Had a conversation with Mr. Berger, Mr. Hosey and Mr. McManus. Mr. McManus was introduced to me as Mr. Hosey's son-in-law and is associated with him in business.

Berger's present position is that they have been waiting for instructions from us. I told Mr. Berger that we had notified them promptly upon being advised by them that they had a contract and that if Engraw chose not to sell at the market at that time Engraw was in effect carrying the glucose for its own account.

I restated our position with regard to the contract.

Berger stated that at the present time they could not secure cancellation for \$30,000 and that the present market was between \$1.08 and \$1.10. I told [Mr. Berger that we had no interest in the market fluctuations in glucose; that we had not completed an agreement for the purchase of the glucose; that Donnelly's and Baglin's letters—in the light of the conversations had with Whipple—could not have been taken by Whipple as concluding the transaction unless the samples were received and the proper purchase order issued by the properly au-

(Testimony of G. Fred Berger.)

thorized in Cincinnati. I further told [329] him that if Engraw was misled in the situation it was Mr. Whipple's responsibility and not Schenley's and that if Schenley offered any settlement it would offer it only on the basis of good will but it certainly would not consider Engraw to have been damaged to the extent that any market fluctuations following the 8th of June or any change in the position of Engraw's supplier resulted in an increase in the loss, if any, that Engraw would sustain. I pointed out to Mr. Berger the fact that the market for glucose around the 8th of June was very strong as indicated by his own communications at the time. I also pointed out to him that as late as August the market was still higher than the price at which Engraw had made its purchase, that it would have been possible even at that late date for Engraw to get out of the situation without loss. Berger's only response to this was that Engraw was waiting for Schenley to declare its position.

I renewed our offer of \$10,000. Mr. Hosey stated that he and Mr. Berger would return on the 18th of September.

In the meantime Berger is to send me photostatic copies of his purchase contracts. Berger is also to try to find out how much cancellation would now cost. I stated emphatically that we were not recognizing that we had any remaining interest in the liquidation of the glucose.

The September 18th conference is at Hosey's and

(Testimony of G. Fred Berger.)

Berger's request and I stated I would agree to meet with them again [330] but only on condition that it was clearly understood that we were not recognizing any obligation in the transaction.

Berger stated that his major interest in glucose was contracts beginning in 1947 and that these transactions had been a side issue.

Berger stated in the course of the conference that Metcalf had agreed over the telephone to the "liquidation procedure" and that this, Berger considered, kept the matter of disposition open. I pointed out to him that this was inconsistent with the correspondence with Goytia's office, and that so far as I knew, Metcalf had made no such arrangement.

R. T. H."

Mr. Bronson: Mr. Berger, you will attend the reading of this now for the reason of the questions that I mentioned.

Mr. L. B. Stanton: I would suggest the witness be permitted to see the document. One has a legal memory and the other has an oral memory.

Mr. Bronson: That is a suggestion, your Honor. I have other thoughts. I may question him if he intends to correct me.

The Court: It is the same rule which the Supreme Court of the United States established with regard to a memorandum which may be used to refresh one's recollection. If, although counsel has

(Testimony of G. Fred Berger.)

the memorandum in front of him, he does [331] not show it to the witness, then it may not need even be offered. Then we have the rule established many years ago by the Supreme Court of California, that case we remember because it happened to be a leading case on the subject of impeachment and cross-examination, I think it is *People v. Jones*. I know it is in 167 Cal., page 1. But the distinction was laid down between impeachment and cross-examination that referred to showing the witness a transcript of what took place. The court said that the witness may be asked if as a matter of fact, at such and such a time he made such and such a statement. If the answer is "yes," the inquiry ends and he need not be shown before he answers that question the document which the counsel may have in front of him. If he answers "no," then the inquiry may be continued but it becomes impeachment, and if the witness asks for it, he is entitled to see the transcript.

So I think at the present time the witness is not entitled to see the memorandum because it is not a memorandum which he prepared. It is not refreshing his recollection. This is a cross-examination and impeachment of his version of the conversation, and rather than it being done by categorical questions, counsel intends to give the summary and ask if that corresponds with his recollection; and if it does not, then, of course, the witness will be allowed to give his own version. All right. [332]

(Testimony of G. Fred Berger.)

Q. (By Mr. Bronson): It is dated "Thursday, September 5, 1946, 4:50 p.m.

"Memorandum for the file.

Schenley-Engraw

"Had a conversation with Mr. Berger, Mr. Hosey and Mr. McManus. Mr. McManus was introduced to me as Mr. Hosey's son-in-law and is associated with him in business.

"Berger's present position is that they have been waiting for instructions from us. I told Mr. Berger that we had notified them promptly upon being advised by them that they had a contract and that if Engraw chose not to sell at the market at that time Engraw was in effect carrying the glucose for its own account.

"I restated our position with regard to the contract.

"Berger stated that at the present time they could not secure cancellation for \$30,000 and that the present market was between \$1.08 and \$1.10."

Stopping there, do you recall quoting the figures at about that price, and were they dollars or pesos?

A. Well, just speaking of the quotation as a quotation and not my recalling it, that would be pesos.

Q. All right. [333]

A. But may I suggest this or may I ask this, at least? We, too, made a memorandum, and if you are asking me to recall something I would like to have our memorandum to check that.

(Testimony of G. Fred Berger.)

Mr. Bronson: Well, either that or the counsel that represents your firm here can bring it in by way of redirect examination.

The Court: I think counsel is entitled to ask you that without your looking at it. I do not think it is the province of a witness to insist on seeing the memorandum merely because counsel has suggested it. You are not entitled to see it. You will have to answer it. In other words, you have given a version of the transaction orally and they have a right to question it either by leading questions or by that memorandum, and later on, if they conflict with each other you may do so. You are not entitled to take the two and examine them. It is not your right as a witness.

The Witness: All right.

Mr. Bronson: I will proceed, then, Mr. Berger.

"I told Mr. Berger that we had no interest in the market fluctuations in glucose; that we had not completed an agreement for the purchase of the glucose; that Donnelly's and Baglin's letters—in the light of the conversations had with Whipple— [334] could not have been taken by Whipple as concluding the transaction unless the samples were received and the proper purchase order issued by the properly authorized in Cincinnati. I further told him that if Engraw was misled in the situation it was Mr. Whipple's responsibility and not Schenley's and that if Schenley offered any settlement it would offer it only on the basis of good will but

(Testimony of G. Fred Berger.)

it certainly would not consider Engraw to have been damaged to the extent that any market fluctuations following the 8th of June or any change in the position of Engraw's supplier results in an increase in the loss, if any, that Engraw would sustain. I pointed out to Mr. Berger the fact that the market for glucose around the 8th of June was very strong as indicated by his own communications at the time. I also pointed out to him that as late as August the market was still higher than the price at which Engraw had made its purchase, that it would have been possible even at that late date for Engraw to get out of the situation without loss. Berger's only response to this was that Engraw was waiting for Schenley to declare its position.

"I renewed our offer of \$10,000. Mr. Hosey [335] stated that he and Mr. Berger would return on the 18th of September.

"In the meantime Berger is to send me photostatic copies of his purchase contracts. Berger is also to try to find out how much cancellation would now cost. I stated emphatically that we were not recognizing that we had any remaining interest in the liquidation of the glucose.

"The September 18th conference is at Hosey's and Berger's request and I stated I would agree to meet with them again but only on condition that it was clearly understood that we were not recognizing any obligation in the transaction.

"Berger stated that his major interest in glucose

(Testimony of G. Fred Berger.)

was contracts beginning 1947 and that these transactions had been a side issue.

“Berger stated in the course of the conference that Metcalf had agreed over the telephone to the ‘liquidation procedure’ and that this, Berger considered, kept the matter of disposition open. I point out to him that this was inconsistent with the correspondence with Goytia’s office, and that so far as I knew, Metcalf had made no such arrangement.”

That is rather long, Mr. Berger. Have you in mind any corrections of Mr. Heymsfeld’s statement of what occurred there as I read it?

Mr. L. B. Stanton: I object to that as being a compound question.

The Court: It is too long a statement. I thought you were going to take paragraph by paragraph and ask him if that correctly represents what took place. To ask him a composite question takes more than a Philadelphia lawyer. This witness is an intelligent witness.

Mr. Bronson: He is intelligent and this ground has been covered a good many times, I thought.

The Court: But a person can’t answer a question like that, and if you want it put that way, then I will withdraw what I said, that he should not see it, but say that he has a right to see it now.

Mr. Bronson: I stepped up for that purpose, your Honor, and I think the comment is very fair.

Q. Will you examine that and comment as you go along if you have any comments on the contents?

(Testimony of G. Fred Berger.)

You are at liberty, Mr. Berger, to make any comments now in response to that question as to the correctness of the statement.

A. In listening to your reading of it and also in examination of it, my own reaction is this: That I think I remember most of the items that are mentioned in this [337] memorandum, but I am not certain and can certainly not say that this was all of the conversation; and, as a consequence, I would like to see our own memorandum first, before giving you a direct answer. In other words, I do not know whether this is all of the conversation.

Mr. E. B. Stanton: Mr. Berger, I think counsel's question, if I may interrupt you for the moment, would be directed to reading that memorandum that you have, and if you find anything in the memorandum that you disagree with, that is what counsel wanted you to point out. That is the point in reading that, if you find yourself in disagreement.

Mr. Bronson: If I may add to counsel's statement, Mr. Berger, without limiting you to any matters that are not covered there, can you state that Heymsfeld's memorandum correctly states the subjects that he covers there?

A. May I look at this again, then, from that point of view?

Mr. Bronson: All right; go ahead.

The Witness: I am not sure exactly what now you want me to say.

(Testimony of G. Fred Berger.)

Q. I want you to state whether or not as to the subjects covered there they are correctly stated, and not limiting you to answer whether it was all that was said.

A. In other words, whether this from what Mr. Heymsfeld said is correctly stated in this memorandum, not [338] whether the items are correct but whether this is what he stated?

Q. No; you misunderstand me. You have a recollection of what happened at that meeting. You want to refresh your memory from your own recollection as to any additions. I am now asking if as to the matters that Mr. Heymsfeld speaks of his memorandum correctly states what happened in those regards at that meeting?

A. In other words, whether it correctly states what he said?

Q. No; whether it correctly states what happened; you said, he said, and everything.

A. Well, to the extent that these are listed here, I believe they represent what he may have said at that meeting.

Q. And as to the matters he said you stated does it correctly state those, too?

A. I believe so as far as these items are concerned.

Mr. Bronson: That being from my file, I will take it. That concludes the cross-examination, your Honor.

(Testimony of G. Fred Berger.)

The Court: All right. Any redirect?

Mr. E. B. Stanton: May we have our morning recess at this moment?

The Court: All right.

(Short recess.) [339]

Redirect Examination

By Mr. E. B. Stanton:

Q. Mr. Berger, you have just completed the testimony referring to a conference with Mr. Heymsfeld in New York on or before September 4th or 5th, and you were shown a memorandum which stated Mr. Heymsfeld's side of the conversation. I now ask you for any further portions of the conversations which you recall and for any further subjects that were discussed at that conversation which were omitted from that memorandum which the defendant has introduced in evidence.

A. Yes; there are.

Q. Will you state them, please?

A. Well, in one discussion, or one matter that is pointed out in the memorandum is the market as of June 8th; and we pointed out to Mr. Heymsfeld at that time that the market for June 8th was, as I have earlier testified here, the same as the market of August, still a more or less nominal market.

Q. Was there anything further?

A. Yes. Then Mr. Heymsfeld also stated to us that Mr. Donnelly had no authority to sign any con-

(Testimony of G. Fred Berger.)

tract or any letter such as was signed. And then, finally, he advised us that though originally they had offered through the office of Goytia \$10,000 as settlement, that he was prepared to [340] increase that offer and apparently was going to let us know in the meeting scheduled for September 18th.

Q. Also on your cross-examination you were asked about quotations from the market, I believe in August, in which you had testified to offers at 1.23 and 1.25, referring to pesos. Were those offers at that figure—or, by whom were those offers made?

A. No. I testified that the market was nominal and that 1.23-1.25 was the asked price, not the bid price.

Q. That is the asked price from the manufacturer's standpoint?

A. No; from the supplier's point of view.

Q. From the supplier's point of view?

A. That is right.

Q. Do you know whether or not there were any sales made at that figure?

A. I do not know, but I don't believe so.

Q. If there were any you do not know of them?

A. I certainly do not know of them.

Q. At the time you made the first purchase to the Schenley account, that is the purchase of 600 tons, were you acting upon any other arrangements other than just the advice of Schenley and the price? Did you have anything else concerning specifications or know what you were quoting on?

(Testimony of G. Fred Berger.)

Mr. Bronson: I think that assumes a fact not in evidence, that he was acting on any information from Schenley at that time.

Mr. E. B. Stanton: I did not mean from Schenley, from Schenley directly, but the question went a little farther than that.

Q. In making the Schenley purchase were you acting simply on the word of Schenley and 600 tons, or was there any other arrangement outside of Schenley that would guide you in the purchase?

Mr. Bronson: May I ask you to restate the question, Mr. Stanton?

Q. (By Mr. E. B. Stanton): At the time you made the 600-ton purchase to the account of Schenley were you taking into consideration any terms of such purchase other than purely an amount quoted and name of the purchaser?

A. Oh, naturally. We had had quite some correspondence with Mr. Whipple in connection with an arrangement for the marketing of glucose, to which I testified earlier yesterday, and in that discussion or in that exchange of correspondence there had been already set up a basis on which we would work, this being a concrete illustration: We assumed, obviously, that whatever was being done was being done along the lines which had been outlined, which included the question of commissions, included the question [342] of his right to obtain his commissions, to add his commission to the price we had before, or to obtain his commission from the purchaser, whatever arrangement was

(Testimony of G. Fred Berger.)

necessary for him to obtain his compensation.

Q. And the same would apply to the matter of the specifications, quality of glucose, etc.?

A. Mr. Whipple knew that every ounce of glucose manufactured by the Pezza people—and this was all Pezza glucose—met all of the U.S.P. specifications, Baume 43-45, et cetera, et cetera; so that he knew definitely what he was offering.

Q. As a matter of fact, that was only——

Mr. Bronson: Wait a minute, wait a minute. I think that states a conclusion, your Honor, in the presence of the statement he got some information from Whipple. He states what Whipple knew, a conclusion, and we object to it.

The Court: I think I am going to strike that, what Whipple knew.

Q. (By Mr. E. B. Stanton): If I may direct your attention again to that question, Mr. Berger, please do not state what it is your understanding Mr. Whipple knew, but explain how, if it was, that information was communicated to Mr. Whipple.

A. That information was communicated to Mr. Whipple by correspondence. [343]

Q. So in closing this transaction you were relying not only on the telegram which you received, but also on your prior correspondence with Mr. Whipple?

A. That is correct.

Mr. E. B. Stanton: No further questions.

The Court: Any additional questions?

Mr. Bronson: I only have one question.

(Testimony of G. Fred Berger.)

Recross-Examination

By Mr. Bronson:

Q. I would like for you to indicate the correspondence, if you can, either by reference to these exhibits or otherwise, where you say he was aware of the specifications that were required in this transaction. They go more or less chronologically from the top down.

Mr. E. B. Stanton: If you are not satisfied with the order of those exhibits, you can place them in chronological order if you so desire.

The Court: Just a minute, gentlemen. You are dealing with exhibits in charge of the clerk.

The Witness: I am not changing them around.

The Court: You are not going to disorganize them, because otherwise it would be confusing to the clerk.

The Witness: I won't change them around at all, your Honor.

Mr. E. B. Stanton: I just merely meant, your Honor, [344] he could refer to them in chronological order.

The Court: Well, that is all right. It is quite a job to keep those in order, gentlemen. Go ahead.

A. Well, if reference in two places will do——

Mr. Bronson: All right.

A. I have got them here. If you want more, I can give them to you.

Q. Let me have the two that you mentioned.

(Testimony of G. Fred Berger.)

A. Yes. Well, in my letter of April the 3rd, 1946 I state "The specifications of the liquid glucose sent to you are the following: 43/45° Baume-not more than .005 SO₂," etc.

Q. All right; that will do for that. You do not need to finish it for my purposes. That was your April 3rd letter, 1946?

A. That is right. 1946, that is right. And then in Mr. Whipple's letter to Mr. Baglin under date of May 21st he quotes the Baume 43-45, et cetera and et cetera. Obviously he had to get that information from us. He wouldn't have it from some other place.

Q. All right; that will satisfy me.

The Witness: These are in order.

Q. All right. The letter you mentioned on April 3, 1946 that, of course, was more than a month prior to the first wire you received on the Whipple negotiations in Los [345] Angeles?

A. Will you say that again, please?

Q. I say, that was a month and a half ahead of the very beginnings of this Schenley transaction?

A. Yes. That, I believe, without going into the detail of the letter again, was a part of our follow-up toward a general marketing of glucose, and not specifically for the one item.

Q. In the second letter you mentioned, you picked out Mr. Whipple's letter to Baglin—a letter, not a cable—written on May 23rd?

A. That is right.

(Testimony of G. Fred Berger.)

Q. In which he went to some detail?

A. I picked that only because it was the first exhibit I found that it was mentioned in.

Q. It is true, isn't it, that your first knowledge of the Schenley connection with this matter came to you, as you pointed out in the morning session today, with the telegram of May 21st in which Mr. Whipple telegraphed you and said "Accept 600 tons at 1 30" and that the Schenley Distillers would open credit?

A. That is correct.

Q. And you state—it may be repeating this—that up to that time you had not purchased firm any glucose?

A. That is right. Our purchases started when that [346] telegram was received.

Q. That was a night letter, as I pointed out to you, received on May 22nd in Buenos Aires?

A. The first thing, early in the morning on May 22nd.

Q. And on the same day you wrote a night letter dated May 22nd, addressed to Whipple, "Acting on your cable twentyfirst have completed firm purchases for Schenley account 1135 tons?"

A. That is correct.

Mr. Bronson: All right, that is all.

The Court: Step down. Call your next witness.

Mr. E. B. Stanton: At this time, in accordance with Rule 26, subdivision (d) we would like to introduce portions of the deposition of Ralph T. Heymsfeld taken in New York October 20, 1947. I am specifically limiting it to portions primarily be-

cause the large part of the deposition was taken up in the matter of exhibits. I am only referring to certain portions of the testimony.

The Court: I think, if you are going to do that, you had better read them then, rather than me read them, because if you are not going to use the entire depositions it is rather confusing.

Mr. L. B. Stanton: I might say, your Honor, we are adopting that for this purpose: There are two volumes, as [347] I understand, of this deposition, and the first volume is entirely of the introduction of a number of documents.

The Court: Yes.

Mr. L. B. Stanton: The second volume we will introduce entirely.

The Court: All right. When you do that, that is all right. If you are going to pick out certain things, then they should be read into the record. Then that gives the other side the opportunity of offering the remainder.

Mr. Bronson: Yes. And it does not cover the matter of any objections that we might make, which were reserved at the time we were taking the depositions.

The Court: That has to be taken up in open court. I would not sit here and go over this with you, as I indicated just before, unless I have the waiver.

Mr. E. B. Stanton: Perhaps I can just proceed and read into the record the portions I suggested, then, Mr. Bronson.

The Court: That is just what I said. If there are going to be portions and they are not read, it doesn't do me a bit of good.

Mr. E. B. Stanton: Starting at page 156 of the second volume.

Mr. Bronson: Will you refer to it by line?

Mr. E. B. Stanton: My copy does not have lines indicated. [348]

Mr. Bronson: Neither does mine. What is the location on the page?

Mr. E. B. Stanton: About the middle of the page.

"Q. What was Mr. C. W. Metcalf's position with your company in May, June, July, and, say, in August of 1946?

"A. He was a consultant. He advised principally on matters concerning the purchase of certain types of materials.

"Q. Had he any authority to act?

"A. So far as I know, he had no authority to act, except such authority as was given him in particular situations.

"Q. From time to time?

"A. From time to time. That is correct."

Referring to page 157:

"Q. When did you first learn of the transaction, with regard to glucose, between Schenley and Engraw or Whipple?

"A. My best recollection is that I first learned of a transaction with Mr. Whipple on June 5, 1946.

"Q. And from whom did you learn that fact?

"A. Mr. Matcalf.

“Q. Was Mr. Metcalf at that time in New York? A. He was. [349]

“Q. And what did he tell you about it?

“A. I refuse to state, because he came to get my legal opinion on the situation.

“Q. Was he a full-time employee of Schenley at that time, or a regular employee? I will put it that way—was he a regular employee?

“A. I would not call him a regular or full-time employee, and he did not participate in any of the benefits, by way of compensation and otherwise, that were available to full-time or regular employees. He was a consultant. My recollection is that he also had some outside business interests of his own, which he carried on at the same time.

“Q. Will you tell us what Mr. Metcalf’s authority was as regards the glucose transactions involved in this case ?

“A. So far as I know, his authority was solely that of a consultant, and adviser in connection with the transactions. He had no authority either to purchase this or any other glucose, nor did he have authority to enter into any agreement concerning this transaction.

“Q. I show you Plaintiff’s Exhibit 18-N, which is a wire from Metcalf to Donnelly. Was that telegram sent in connection with his duties as adviser or consultant? [350]

“A. I would say that it is clear from the telegram itself that he is asking for details and information; and, if my recollection is correct, there

is another memorandum in which he sets forth what his purpose may have been, and that is the memorandum of June 3rd from Mr. Metcalf to Mr. Kiefer.” [351]

Mr. Bronson: May I interrupt you a minute. You already introduced into evidence both of those documents. Otherwise your reading of it will have no significance.

Mr. E. B. Stanton: I am not sure which one we did put in, Mr. Bronson.

Mr. Bronson: I am not either.

Mr. L. B. Stanton: What were the numbers?

Mr. E. B. Stanton: 18-N.

Mr. L. B. Stanton: I don't believe 18-N went in.

Mr. E. B. Stanton: I don't care about introducing it.

Mr. Bronson: All right, pass it.

Mr. E. B. Stanton: Starting now on page 159, at the bottom of the page:

“Q. Have you any knowledge of the request to the New York office of Schenley for the issuance of a letter of credit in this transaction?

“A. No, sir.

“Q. You say you have no knowledge?

“A. That is right.

“Q. Do you know whether or not the New York office refused to issue such letter of credit to cover this glucose?

“A. You mean refused somebody's request to issue the letters?

“Q. Yes. [352]

“A. There was a request that came from Engraw, which was refused.

“Q. You are now referring to a communication addressed to Schenley from Engraw, are you?

“A. That is correct, sir.

“Q. Are you referring to cable, Plaintiff’s Exhibit 26-N, addressed to Cincinnati?

“A. Yes, that was the cable I have in mind.”

Mr. L. B. Stanton: That is 26-N.

Mr. E. B. Stanton: 26-N is in evidence.

Mr. Bronson: Is it?

Mr. E. B. Stanton: Yes, that is in evidence now. That is Plaintiff’s Exhibit 27. When referring to it as 32-N in the deposition, he referred to Plaintiff’s Exhibit 27.

“Also, the cable which is marked Exhibit 32-N.”

32-N for the record is Plaintiff’s Exhibit 28.

“Q. That was likewise addressed to Cincinnati, was it not? A. That is correct.

“Q. Do you know of any telephone call from Cincinnati to your New York office asking that the New York office arrange for the issuance of a letter of credit? A. I do not.

“Q. You had not been asked with reference to that, with reference to issuing a letter of credit at that time? [353]

“A. I received no request to issue a letter of credit.

“Q. If such a request had been made, to whom would it be addressed in your organization in New York?

“A. The actual details of issuing a letter of credit would be handled with the bank, if handled in normal course, by the treasury department. A request might have been received by the New York office through any one of a number of channels, depending upon who was making the request for the issuance of the letter of credit.

“Q. To whom would it be submitted for approval?

“A. It would finally have to be approved by an executive officer of the company.

“Q. You? A. No, sir.

“Q. You mean any one of a number of executive officers?

“A. I would answer that question in this way, that the treasurer of the company would proceed to secure the final issuance of the letter of credit, if he were entrusted to do so by any one of a number of officers of the company; but no officer of the company would authorize the issuance of the letter unless he were personally familiar with all of the details of the transaction or familiarized himself with them by communication [354] with other officers of the company.

“Q. Who was the first one in your New York office, then, to whom the glucose transaction which is involved in this case was submitted?

“A. I am unable to state. I believe that the first officer in the New York office to whom attention the matter came was Mr. Seskis, who is a vice-president of the company, but I am not certain of that.

“Q. Did Mr. Seskis discuss this matter with you?

“A. So far as I know, no request was ever made to Mr. Seskis to issue a letter of credit in this transaction.

“Q. Who was the first one to call your attention to this glucose transaction?

“A. Mr. Metcalf.

“Q. And was that the conversation of June 5th, did you say?

“A. Yes, June 5th, to my best recollection.

“Q. And that is the conversation, the substance of which you decline to give?

“A. That is correct,—almost directly after the first conversation.

“Q. And what was the substance of that conversation?

“A. I decline to state. [355]

“Mr. Pickett: Will you state for the record why?

“The Witness: Because I consider it a privileged and confidential communication.

“Q. Woolsey was assistant secretary, wasn't he, of the company at that time?

“A. Yes, Woolsey was an assistant secretary of the company at that time.

“Q. I show you a copy of a telegram addressed to Harold A. Whipple and signed Schenley Distillers Corporation by ‘Jas. E. Woolsey, assistant secretary,’ marked Plaintiff's Exhibit 31-N and ask you whether you know of the sending of this telegram by Mr. Woolsey.”

That is in evidence under Plaintiff's Exhibit No. 13.

Mr. E. B. Stanton (Reading) :

"A. Yes, I knew it was being sent.

"Q. You knew it was being sent?

"A. That is correct, sir.

"Q. Did you direct him to send it?

"A. May I state the circumstances?

"Q. Certainly.

"A. Mr. Woolsey told me of a conversation that he had had with Mr. Whipple and stated that Mr. Whipple had requested that Mr. Woolsey confirm to him, by writing, what Mr. Woolsey told him in the conversation. I told [356] Mr. Woolsey that I saw no objection to confirming it, in fact, I thought it was advisable to do so.

Q. Did you authorize the telephone conversation or the telephone notice on the part of Woolsey which this telegram confirmed?

"A. I transmitted it, but did not authorize it.

"Q. I don't quite understand your answer.

"A. I don't mean to quibble, but I did not make the decision to give that notice to Mr. Whipple. That decision was made elsewhere in the company. I was told about it and instructed Mr. Woolsey to communicate with Mr. Whipple.

"Q. Who made that decision?

"A. To the best of my recollection, Mr. Kiefer.

"Q. Of Cincinnati?

"A. Mr. Kiefer spent most of his time in Cincinnati.

“Q. And what is Mr. Kiefer’s position with the company?

“A. Mr. Kiefer is a vice-president in charge of the production department, of which the purchasing department is a division.

“Q. And it was Mr. Kiefer’s decision that this statement should be made to Mr. Whipple on behalf of the Schenley Company?

“A. It was Mr. Kiefer’s decision that we would not [357] go further with the purchase and, as I stated, I then told Mr. Woolsey to communicate that decision to Mr. Whipple.

“Q. Did Mr. Kiefer ask your advice as to whether or not that communication should be sent to Mr. Whipple, or did you merely follow his instructions to do so?

“A. No. My best recollection is that Mr. Kiefer had made his decision and then discussed with me my opinion as to the procedure to be followed.

“Q. The procedure you are referring to is as to the method of notifying Whipple or Engraw of his decision?

“A. My recollection is when that decision was made we had already received a cable from Engraw, in which reference was made to contracts and to cancellation and to penalties, and Mr. Kiefer naturally sought my opinion in connection with the transaction, and the steps to be taken in it, and I gave him my advice as to the steps to be taken, because it was perfectly apparent that the parties were in a dispute.”

Referring now to page 168:

“Q. Do you know Emanuel R. Dichter?

“A. I know who he is. I have never met him.

“Q. Wasn’t he an employee of Schenley, attached to your New York office? [358]

“A. I don’t know, at the moment, whether he was employed generally, or specially employed. I can find out easily enough. But, in either event, he performed some service for Schenley over a relatively short period of time, and in South America.

“Q. You know, of course, that Metcalf sent Mr. Dichter to Buenos Aires?

“A. I do know that, yes.

“Q. Did you tell him to?

“A. No, I did not.

“Q. Do you know of a time he telephoned to Dichter at Rio to go to Buenos Aires?

“A. I knew that he was going to send Mr. Dichter from Brazil to the Argentine.

“Q. Did you authorize him to do so?

“A. I did not authorize him to do so, no.

“Q. Did he act on his own authority in doing it? A. I can’t answer that question.

“Q. But he did talk to you before he telephoned Mr. Dichter at Brazil?

“A. That is correct.”

Now, on page 186, about the middle of the page:

“Q. Who finally decided to refuse to go on with the purchase? [359]

“A. My best recollection is that it was Mr. Kiefer.

“Q. And he had full authority to so decide?

“A. He did.”

And on page 195:

“Q. Mr. Heymsfeld, you were asked about a telephone conversation which you had with Mr. Woolsey on June 6, 1946, specifically as to instructions which you gave to Mr. Woolsey to be communicated to Mr. Donnelly. Confining yourself to that subject, will you state what you told Mr. Woolsey about it?

“A. As I have testified, I did not tell Mr. Woolsey to instruct Mr. Donnelly not to do anything further in the matter. I did tell Mr. Woolsey that the matter had been referred to the legal department and for him to make sure that no one in the company's employ on the Coast took any steps in the matter without clearing with him and, in turn, with me.”

Mr. E. B. Stanton: I now want to introduce from the depositions certain exhibits, the gravaman of which I believe has all been admitted by the defendants.

First referring to Plaintiff's Exhibit 40-N, being a letter on the stationery of Schenley Affiliates to Mr. R. T. Heymsfeld, from Jas. A. Woolsey, signed Jas. E. Woolsey.

Mr. Bronson: Just give us a moment, will you, to locate these, if you will? 40-N, is that the number of it? [360]

Mr. E. B. Stanton: 40-N.

The Clerk: Is this admitted? Do you want to see it?

Mr. Bronson: No objection to it.

The Court: If there is no objection, it may be

received. I will not stop now to read it.

The Clerk: It is PLAINTIFF'S EXHIBIT 51 in evidence.

“Schenley Affiliates Inter-Office Communication
Compliance Department—California

To: Mr. R. T. Heymsfeld—New York,

Date—June 7, 1946

cc: Messrs. J. B. Donnelly, C. J. Kiefer

From: Jas. E. Woolsey—San Francisco

Subject: Schenley—CIA Engraw Comercial &
Industrial S. A.—Argentine Glucose

“Today I sent Harold A. Whipple the following wire which is self-explanatory:

“Following our telephone conversation of yesterday, and in response to your request that said conversation be confirmed in writing, we advise that we are not entering into any agreement with CIA Engraw Comercial & Industrial SA for the purchase of glucose.

SCHENLEY DISTILLERS
CORPORATION

By: JAS. E. WOOLSEY [361]

Assistant Secretary.

“I shall keep you advised of further developments.

JAS. E. WOOLSEY.”

JW:VM

Mr. E. B. Stanton: Next referring to the exhibit in the deposition, to Plaintiff's Exhibit 30-N, for identification, being a Memo of telephone conversation with Harold A. Whipple, June 6, 1946, by Jas. E. Woolsey.

The Clerk: Plaintiff's Exhibit 52 in evidence.

The Court: It is admitted. [362]

PLAINTIFF'S EXHIBIT 52

Memo of Telephone Conversation With Harold A. Whipple—June 6, 1946

Shortly after 2:00 this afternoon, I succeeded in getting Whipple on the telephone and told him I was calling for Schenley Distillers Corporation to advise him that Schenley would not enter into the contract with Engraw, to purchase Argentine glucose.

Whipple said that I meant that I was repudiating, on behalf of Schenley, the contract completed by the letter on Schenley letterhead signed by Donnelly and dated May 23. I answered that Schenley's position in the matter was that there was no contract between Schenley and Engraw; that the parties to the proposed contract had never agreed upon specifications; that Schenley had never issued any purchase order, and that Schenley had not put up the letter of credit, and that, in our opinion, there was no contract and that I was phoning him this information to Engraw.

He said that there was damage; that he had acted in good faith upon the written word of a Schenley official on Schenley letterhead. I told him Donnelly was not an official of Schenley. He said he supposed Schenley could go into court and claim that Donnelly was not an [363] official and had no authority to commit Schenley. I told him that our position

was that we had not ~~expected~~ (Written in ink 'approved') samples; that we had not issued any purchase order; (in ink on margin 'that we had not furnished or agreed upon specifications') and had not put up any letter of credit, and that there was no contract as far as we were concerned.

"He asked me to state in writing that we were repudiating the deal and give our reasons for doing so. I told him that I would transmit his request to the proper person. He again repeated that he had acted in good faith on Donnelly's letter of May 23 and that now he had been advised, presumably by one of Schenley's lawyers, that Schenley repudiated the contract made by Mr. Donnelly. I said that I was a member of the Law Department.

"He said that he had forwarded to Many Blanc, Chicago, yesterday, a part of a sample that he had of the product; that he had gone to a lot of trouble and great expenses in the negotiation; that he 'smelled a rat' in the deal when Schenley had requested a sample; that undoubtedly Schenley was trying to deal directly in the Argentine market and cut someone out of a commission that had been earned. I again told him that our position was that there was no contract and cited the [364] reasons given before. He repeated his request that Schenley notify him in writing, and I again told him that I would pass the request on to the proper persons. He asked that Schenleys' reasons for repudiation be given in its written notice that it had repudiated the contract.

JAS. E. WOOLSEY."

Mr. E. B. Stanton: Next from the deposition, Plaintiff's Exhibit 29-N for identification, being a telegram to Many, Blanc & Co., Inc., dated June 6th, 1946, signed Jas. E. Woolsey.

The Clerk: Plaintiff's Exhibit 53 in evidence.

Mr. Bronson: We make the objection, for the record, that the termination of negotiations had been effected at the time, at least by the verbal communication from Mr. Woolsey to Mr. Whipple. The Court hasn't any idea of the——

Mr. E. B. Stanton: I wish to be heard on that, your Honor.

The Court: All right, gentlemen, what is it?

Mr. E. B. Stanton: That telegram is significant and important to our case, for this reason, your Honor. It tends to show the bad faith with which the Schenley organization was acting in this matter. Now, if you will recall, there is in evidence the fact that Mr. Whipple was instructed by the Schenley Company to send this sample to Many, Blanc. Now, [365] if you will recall, there is in evidence the fact that Mr. Whipple was instructed by the Schenley Company to send this sample to Many, Blanc. Now, on the same date as that telegram indicates, the Schenley Company wired Many, Blanc that the sample was coming and when it came, to disregard it. And yet, they have set up here that one of their defenses is that they had no sample. Yet, when a sample is being sent, at the same time they wire the place where the sample is being sent, to disregard that sample and not examine it or take any steps on it.

The Court: Well, you are reading a lot into it that is not in there. I am sorry. It says, "Sample of Argentine glucose being sent to you by Harold A. Whipple Co., Los Angeles. Do not take any action"—Now, unless I understand that was sent to Many Blanc Company for the purpose of analysis, then I cannot take those words as meaning do not take any action or have any further correspondence whatever regarding this sample at any time, I cannot read those words into it, as you are trying to read them in.

Mr. E. B. Stanton: Well, I think it is a fair interpretation, if you tell a man "Do not take any action" it certainly means do not proceed with the analysis.

The Court: Were these people chemists?

Mr. E. B. Stanton: These were the chemists. If you recall the exhibit, Mr. Whipple sent a letter to Many Blanc [366] with a sample. He sent a carbon copy to Mr. Baglin, that he had sent the telegram to Many Blanc. Now, this is a telegram from Schenley Company telling Many Blanc not to take any action on the sample, yet they are the ones that told Mr. Whipple to send a sample to them.

The Court: I will overrule the objection, but I just want to emphasize the fact that the words of the telegram do not necessarily mean——

Mr. E. B. Stanton: Well, I appreciate that I am putting my own interpretation on it, your Honor. The telegram, after all, speaks for itself.

The Court (Continuing): —anything except what they mean on their face, unless, of course, by reference to other facts, which, of course, is a matter of argument. I will overrule the objection. It bears on the sample regardless of interpretation that I put on it, and my only object in calling your attention to it is merely to say that I think it bears on it without agreeing with you at this time as to your interpretation.

Mr. E. B. Stanton: I may have been giving the telegram a liberal construction.

The Court: Well, that is all right. In other words, I admit the exhibit without the argument in support of it.

Mr. E. B. Stanton: Thank you, your Honor.

The Court: All right, it may be received and the [367] objection is overruled.

The Clerk: PLAINTIFF'S EXHIBIT 53 in evidence.

“Western Union

Many, Blanc & Co., Inc.

3414 W. 48th Place

Chicago, Illinois

June 6, 1946

12:05 p.m.

Attention: Mr. Bayles

Sample of Argentine glucose being sent to you by Harold A. Whipple Co., Los Angeles. Do not take any action or have any correspondence whatever regarding this sample at any time.

JAS. E. WOOLSEY.”

Mr. E. B. Stanton: I now offer from the deposition Plaintiff's Exhibit 22-N, a memorandum or letter on the stationery of Schenley Affiliates to Mr. Chas. Metcalf from Carl J. Kiefer, Subject: Argentine Glucose, dated May 29, 1946, signed Carl J. Kiefer.

The Clerk: Is this admitted also, your Honor?

The Court: Yes.

The Clerk: Plaintiff's Exhibit 54 in evidence.

PLAINTIFF'S EXHIBIT 54

"Schenley Affiliates

To: Mr. Chas Metcalf

CC-Mr. I. J. Seskis

Date May 29th, 1946

From: Carl J. Kiefer

Subject: Argentine Glucose

Branch Office Cincinnati

File K-5/29-14

You 'phoned me today that you had contacted Donnelly in San Francisco relative to this matter and I advised you that I had written to me, Seskis to handle the same. Therefore, in order to uncross these varoois wires I am sending both you and Mr. Seskis copy of Donnelly's letter to me on the subject so that you can proceed as per my precious letter to Mr. Seskis.

I await your further advice.

CARL J. KIEFER.

CJK:DW

Encl." [369]

Mr. E. B. Stanton: I next offer from the deposition Plaintiff's Exhibit 25-N for identification, being on the letterhead of Schenley Affiliates, a letter date June 3, 1946, to C. J. Kiefer from C. W. Metcalf.

The Clerk: Your Honor, are all these deemed to be admitted unless they are objected to?

The Court: Yes, when there is no objection, they are to be received.

The Clerk: Plaintiff's Exhibit 55 in evidence.

PLAINTIFF'S EXHIBIT 55

"Schenley Affiliates
Inter-Company Communication

Date June 3, 1946

New York Office

To: Mr. C. J. Kiefer

cc-Mr. I. J. Seskis

From: C. W. Metcalf

Subject:

The wires are not crossed as far as I am concerned regarding your purchase of 1,135 tons of Argentine glucose. Mr. Gusky came down and said that he understood that we had bought glucose for shipment from the Argentine, that if the rumor was true that he had some space for June that was available and would I please find out what the situation was. I wired Mr. Donally for the information. The telegram that I received back was not clear, therefore, I called Mr. R. H. Paglin on the tele-

phone. [370] When I talked with you over the telephone on Tuesday, you asked me to check on the sellers of this material, which I attempted to do.

The above completely covers my interest in this transaction.

This is for the records.

CWM.

CWM:MB'' [371]

Mr. E. B. Stanton: I now introduce from the deposition Plaintiff's Exhibit 15-N for identification, being a copy of a wire.

Mr. Bronson: Now, wait a minute, if you will. You are going a little too fast for me. Before you start discussing it, would you mind giving me a moment to examine it and find out——

Mr. E. B. Stanton: Certainly, 15-N.

Mr. Bronson: Okay.

Mr. E. B. Stanton: 15-N being a copy of a wire to Carl J. Kiefer, Schenley Distillers Corporation, on May 21, signed J. B. Donnelly.

The Clerk: No objection? Plaintiff's Exhibit 56 in evidence.

PLAINTIFF'S EXHIBIT 56

Western Union

WU B127 Ser

Sanfrancisco Calif May 21 1025A

Carl J. Kiefer

Schenley Distillers Corp

Importer expects a cable reply from Argentina tomorrow on glucose. It is possible we can obtain full 1300 tone with deliveries at rate of 100 tons a month at start. This represents almost \$600,000. Will call you tomorrow regarding necessary budget for purchase of this commodity. [372]

Mr. E. B. Stanton: I now offer from the Heymsfeld deposition Plaintiff's Exhibit 12-M for identification, being a memorandum to C. Balzer from R. H. Baglin, subject Argentine glucose, signed R. H. Baglin.

The Clerk: Plaintiff's Exhibit 57 in evidence.

PLAINTIFF'S EXHIBIT 57

May 20, 1946

JBD

San Francisco

B520-S

"Mr. C. Balzer

R. H. Baglin

Argentine Glucose

"I believe the purchase of the Argentine glucose is materializing. Mr. Kiefer has approved our

purchasing up to 1,000 tons. This quantity would be shipped from the Argentine between June and December. The shipments through September are likely to be confined to 50 tons or better a month.

The Argentine shipper is being cabled today to ascertain definitely that the glucose is available. Possibly by Wednesday of this week we can give you something as to whether or not the deal is going through.

R. H. BAGLIN.

RHB:SR [373]

Mr. E. B. Stanton: I next offer from the Heymsfeld deposition Plaintiff's Exhibit 17-N for identification, being a letter or memorandum on the stationery of Schenley Affiliates to Carl J. Kiefer from J. B. Donnelly, subject Argentine glucose, dated May 23, 1946, consisting of a three page letter, bearing the signature on the last page, J. B. Donnelly, together with and attached to this letter a copy of the letter from Donnelly to Whipple dated May 23, 1946.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 58 in evidence.

The Court: All right.

PLAINTIFF'S EXHIBIT 58

"Schenley Affiliates

Date May 23, 1946

Branch Office San Francisco

File D523-18

To: Mr. Carl J. Kiefer

Arom: J. B. Donnelly

This will confirm our conversation of yesterday. We have been advised by the Harold A. Whipple Co., importers and exporters acting as agents for Cia. Engraw Comercial & Industrial S.A., that 600 tons of glucose is available for shipment at the rate of 150 tons a month starting in July and ending in October. Further, they believe an additional 700 tons will be made available for delivery in the last quarter of this year.

Mr. Whipple received a cable from Engraw as follows: [374]

'Six hundred tons available price 1.375 (pesos per kilo) confirmed credit our order delivery hundred fifty tons monthly starting July. Answer today. Will endeavor to secure balance if you confirm.
/s/ENGRAW.'

Mr. Whipple replied by cable as follows:

'Accept 600 tons one thirty seven one half. Shipments one hundred fifty monthly. Will accept balance as available same price. Schenley Distillers will open credit entire amount. Try ship during June. Cable confirmation. Signed Whipple.'

Mr. Whipple advises us he will notify us just as soon as he receives a reply. He hopes that they will be able to handle the balance during the last quarter of the year.

We have been given a breakdown of the price as follows:

'The export exchange rate on Argentine pesos is U. S. \$100.00—335.82 pesos or U. S. \$0.29778 per peso.

At 1.375 pesos per kilogram—or U. S. \$0.4094575 per kg.—(one kg.—2.2046 lb.)—\$0.18573 per lb.

Freight rate is \$25 per 40 cu. ft.; the barrels contain slightly less than 15 cu. ft. with a net content of apprx. 660 lbs., or the equivalent of apprx. 0.0142 per lb. Insurance 1½% 30c per 100 lbs. .0030 per lb. Duty —2c per lb. .02; giving a landed cost est. 0.22293 per lb." [376]

"The letter of credit should be opened in favor of: Cia. Engraw Comercial & Industrial S. A.

San Martin 329

Buenos Aires

through the First National Bank of Boston, Buenos Aires, by cable, covering the full amount in pesos at 1.375 pesos per kilo. net, f.o.b. steamer, Buenos Aires; expiration October 30, 1946, or as confirmed."

Mr. Whipple further advised us that the 335.83 pesos per U. S. \$100 is a pegged rate for export and is therefore not subject to fluctuation. This means that the only variation in price that can occur will be in the freight rate, where there may

be a slight difference. However, in no case will the price be higher than 22.3 cents a lb. The McCormick Steamship Co. will be the carrier. While Engraw wishes the letter of credit to be placed through the First National Bank of Boston in Buenos Aires, this may have to be changed depending upon the arrangements made by our New York bank. If there is to be a change in banking connections, I would appreciate hearing from you as soon as possible so that I can notify Mr. Whipple.

In addition to the above, Mr. Whipple advises me that Engraw has indicated they will be in a position after January 1st to furnish from 300 to 500 tons monthly at the then prevailing market price for glucose. I would like a word from [376-A] you as to whether we care to book any of the production for 1947 as outlined. We will discuss this further with Mr. Whipple, and attempt to arrange a hold on the 1947 product pending examination of the glucose. In any case, I will keep you informed if Engraw or Whipple try to pull a rush act on us for the 1947 production, although I will accept the additional 700 tons of 1946 material if it can be made available.

We have been advised by Engraw, through Whipple, that the quality of this glucose is pure corn syrup, crystal clear, testing 43 to 45 Baume. A sample is expected by air express within the next few days.

I believe that documents to accompany draft under letter of credit should include a certificate of

analysis, as well as a certificate of inspection of cooerage at time of loading, for your own quality control and for insurance purposes.

We believe there are two possible methods of handling the mechanics of purchasing this material, and because of the size of the order we favor the first.

The first method is as follows: We will advise Whipple, by letter, of acceptance of the 600 tons at the price quoted, for further transmission to Engraw. Del Eberts can then prepare in Cincinnati the necessary purchase orders for direct transmittal to Engraw in Buenos Aires, and at the same time arrange for the letter of credit through our [376-B] New York bank to cover this purchase. It can be stated on the purchase order that all further communication with regard to the shipment is to be directed to the San Francisco office, and we will follow up on all further details.

The second method would be to have our West Coast Purchasing Department issue the purchase order, with copy to Cincinnati. You or Del Eberts could then arrange for the proper letter of credit to be issued from New York to cover the purchase.

I believe the information contained herein is sufficient to issue the purchase order. I would appreciate your advising me if you intend to have Del follow through on this.

We have written a letter of acceptance to Mr.

Whipple, copy of which is attached for your information.

Regards,

/s/ J. B. D.

J. B. DONNELLY.

JBD:LP

enc.

P.S. Since dictating the above, we have received advice from Mr. Whipple that Engraw can now deliver to us 1135 tons, shipped as follows:

June 50 tons, July 60 tons, Aug.-Sept. 200 tons, September 150 tons, [376-C] October 275 tons, November 200 tons, December 200 tons

provided that the letter of credit covers the entire 1135 tons. We therefore have changed our letter of acceptance accordingly.

J.B.D.

bc Mr. C. J. Kiefer

May 23, 1946

Harold A. Whipple Co.

316 Commercial Street

Los Angeles 12, California

Attention: Mr. H. A. Whipple

Gentlemen:

This will confirm our telephone conversation and your letter of May 21st.

We hereby acknowledge the offer of Cia. Engraw Commercial & Industrial S. A., of 600 tons of glucose made from pure corn syrup, crystal clear, and testing between 43 and 45 Baume, at a price of 1.375 pesos per kilogram. The price listed is f.o.b.

steamer, Buenos Aires, packaged in wood cooperage containing approximately 660 pounds each. Shipment is to be made via McCormick Steamship Co. to San [376-D] Francisco or Los Angeles.

A purchase order will be sent to Cia. Engraw Comercial & Industrial S. A. as soon as possible covering this purchase, and a letter of credit will be set up to cover the full amount in pesos. Expiration date will be October 30, 1946, or as confirmed. Shipment of this material is to be at a rate of 150 tons a month.

All correspondence will be handled via air mail instead of regular mail, in order to speed this matter.

Very truly yours,

SCHENLEY DISTILLERS
CORPORATION,
J. P. DONNELLY.

JBD:LP

P.S. Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial S. A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept.—200; September—150; October—275; November—200; December—200. The conditions of acceptance of this quantity are the same as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing.

Mr. E. B. Stanton: I next introduce in evidence

the interrogatories and answers to said interrogatories which were directed to Jas. E. Woolsey which the clerk has in the file, I presume.

The Court: All right.

The Court: All right. Now, gentlemen, there was some question as to whether you were going to make some objections, Mr. Bronson.

Mr. Bronson: Yes. I am not prepared on that.

Mr. Rowe: No, no. We did not know what was going to be done about this. I think perhaps if we adjourn now and discuss with Mr. Stanton exactly what he expects to introduce in this fashion, we can arrange our objections, so we can go along.

The Court: Other than the interrogatories, have you anything further?

Mr. E. B. Stanton: Other than the interrogatories I have nothing else at this time except the South American deposition which we intend to go into after the noon recess.

Mr. Rowe: May I suggest that we pass the Woolsey interrogatories and adjourn at this time, your Honor? We will look them over during the noon hour.

Mr. E. B. Stanton: My intention is, of course, to offer the Woolsey interrogatories in full, of course subject to any objection. [377]

Mr. Rowe: I suggest, your Honor, that we adjourn at this time. It will take us, of course, a little while to look them over, but frankly we did not know whether they were going to be used or not.

The Court: Will that conclude your presentation?

Mr. E. B. Stanton: I believe so, except as I said, the South American depositions.

The Court: I mean you have no other oral witnesses?

Mr. E. B. Stanton: No other oral witnesses.

The Court: Gentlemen, I was just trying to anticipate how things are. What form will your testimony take? Have you any witness or will they all be by depositions?

Mr. Bronson: We have two witnesses who will testify orally.

The Court: Yes.

Mr. Bronson: And then we have depositions we are putting in. We have some that are here from South America and some that are not yet here, to be received, those that were taken on letters interrogatory, so that I think, your Honor, the case will have to be deferred for some indefinite period, that is, the closing of it.

Mr. E. B. Stanton: In that respect, your Honor, I thought we may as well bring up at this point one problem that we have. We have one witness from South America whom we [378] consider solely for the purpose of being a rebuttal witness to these depositions. Of course, we are aware, to a certain degree, of the answers in these depositions, that is the proposed answers to the depositions, but this witness is arriving in Los Angeles from South America Wednesday. Of course, I don't expect that their depositions will arrive from South America until sometime after that, but I thought

that, if possible, we could set a time for the hearing of this rebuttal witness, even though it is in advance, perhaps, or a bit out of order.

The Court: Well, it all depends, gentlemen, on when you conclude. As you know, my cases follow one after another. Let us see what we have. Let me see what cases I have to try next week. I am calling cases for setting and I may set some immediately.

Mr. E. B. Stanton: I will be willing to stipulate that rather than take the time to open court, if Mr. Bronson and Mr. Rowe will stipulate, when this man arrives in Los Angeles we can take his deposition.

The Court: Well, we can arrange it probably for later in the week. I don't know whether Mr. Bronson and Mr. Rowe will want to stay over indefinitely.

I intend to take this week end, gentlemen, to bring myself up to date. I have studied the exhibits as we went along, but, with so many depositions in, I intend to read [379] them and bring myself up to date as far as I can, because even if there is anything left of the case, if the case is kept open for further proceedings, it is well that I know everything that is in the record up to the time the additional testimony is brought in. I have no objection to making an arrangement to hear this witness out of order, in open court, sometime next week.

Mr. E. B. Stanton: Well, his telegram states

that "Just arrived. Will be in Los Angeles June 9th."

The Court: I think we better adjourn until 1:30 and I think if I get on the job in between, there is no danger of my conferences running over. I got here at a quarter to nine this morning but I was in conference with one of the Judges and he did not look at the clock and neither did I, so if I get on the bench in between, there is no chance of anybody breaking in, because if I am on the bench I won't be interrupted, so I think we can continue this until 1:30, and it may well be that we can complete this, this afternoon. Is there any reason why we can't, with only two witnesses?

Mr. Bronson: The only thing is, Judge, we have been rather pressed with matters concerning this case and perhaps we do not work quite as rapidly as your Honor does, but the fact of the matter is that we have not prepared ourselves yet fully on our side to make the objections that you require, as they are submitted, to these South American depositions [380] taken by plaintiff. You remember you suggested that we be prepared to read them and make objections. [381]

The Court: The point is this: If they are offered in their entirety, then you can just go down the line of the objections, just pick out the objections and raise them.

Mr. Bronson: Yes; but you want us to do that *vive voce* here in court, and I say we are not quite prepared. We could do that before the week-end passed.

Mr. L. B. Stanton: I think that is a little bit out of order, Mr. Bronson. You have had these depositions——

Mr. Bronson: That is right.

Mr. L. B. Stanton: ——pretty near six months now.

The Court: I will decide that. I am not trying to rush you gentlemen. I try to economize the time, and it might well be that the depositions may be offered and then we will hear the oral testimony and your depositions, and then when we are through with all the oral testimony we can take up the objections to the depositions. While ultimately objections to depositions conform to a pattern, to an idea——

Mr. Bronson: That is right.

The Court: ——you know exactly what you want.

Mr. Bronson: We have gotten about halfway through and I was going to say, I am sure we will be ready tomorrow morning so that you can close then with those objections fully. [382]

The Court: We will see how we go this afternoon. I do not want to continue the case and not hear the defense before the objections. There is the difficulty. I do not like them out of order in that manner. The more so as I enunciated what I considered to be the liberal rule that objections, unless they really go to the essence of a case or of a defense, objections to evidence amount to very little.

Very well. Let us take adjournment until 1:30

and then we will see how far we get this afternoon and what to do about it. All right; 1:30.

(Whereupon, a recess was taken until 1:30 p.m. of the same day, Thursday, June 3, 1948.)

Thursday, June 3, 1948, 1:30 P.M.

Mr. Rowe: May it please the court, I believe at the time of adjournment the plaintiff had just offered in evidence the answers of Mr. Woolsey to certain interrogatories propounded to him by the plaintiff.

The Court: I don't think we got that far.

Mr. E. B. Stanton: We have not got to the offer yet.

Mr. Rowe: You had not?

The Court: No. We started in and then we got to talking about it, and it did not occur to me until after I left the bench that I had broken in right in the middle and that the offer had not been completed. So we will start all over again now. I was just directing the clerk to find the interrogatories for me so that I could follow them. We have built so voluminous a file, gentlemen, that it is hard to find just where things are.

Mr. L. B. Stanton: We have been getting a little experience with Federal rules of discovery.

The Court: This is off the record:

(Brief comment off the record.)

Mr. E. B. Stanton: I am offering the questions and answers addressed by written interrogatories to James Woolsey.

The Clerk: A separate exhibits? [384]

Mr. E. B. Stanton: I am offering as one exhibit the questions and answers thereto.

The Clerk: They are separate documents.

The Court: Mark them as one exhibit and give them subdivision numbers A and B. They should be together because they relate to the same matter. Years ago we used to have the habit of having them consolidated in the answer, but I notice modern notaries do not do that any more. When I practiced law, which is a good many years ago, we used to consolidate the questions into the answers in one document, and then you knew when you were in court the judge could see it right before him, otherwise he has to keep two documents in front of him.

Mr. E. B. Stanton: Mr. Rowe has informed me on behalf of the defendant that they have no objection to the interrogatories alone.

The Clerk: The interrogatories are marked as Plaintiff's 59 in evidence; the answers to the interrogatories are marked Plaintiff's Exhibit 59-A in evidence.

The Court: Now, gentlemen, before I rule on the other, I understand there is no objection to the interrogatories because those were settled. Have you any objections to the answers given?

Mr. Rowe: No, your Honor. As a matter of fact those were not interrogatories which were settled by the court. [385] They were handled, I think, on the theory of interrogatories addressed directly to a defendant, and in answering the interrogatories

we interposed our objections to the interrogatories, and then when we felt that we should answer, we did answer. And in the form in which we have prepared the answers to plaintiff's interrogatories we have no objection to that answer being received into evidence.

The Court: It was on requests for admissions?

Mr. Rowe: Well, it was not exactly. It was more interrogatories than requests.

The Court: All right, gentlemen. Then they will be received into evidence. I won't take the time to read them now, so you can go on with the other.

The Clerk: Plaintiff's Exhibit 59 and 59-A in evidence.

The Court: They may be so received.

(PLAINTIFF'S EXHIBITS 59 AND 59-A
are in the following words and figures, to-wit:)

“Stanton & Stanton
740 South Broadway
Suite 1004-09
Los Angeles 14, California
Phone: TRinity 3266
Attorneys for Plaintiff

Plaintiff's Exhibit 59—(Continued)

In the District Court of the United States for the
Southern District of California Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E. IN-
DUSTRIAL S. A., a corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION, a
corporation,

Defendant.

Interrogatories Addressed to Jas. E. Woolsey

The following written interrogatories herein are addressed to Jas. E. Woolsey, as assistant secretary of the defendant in said action, under the terms of Rule 33 of Federal Rules of Civil Procedure. It is requested, in accordance with said rules, that each of said interrogatories be answered separately and fully in writing, under oath, and that said answers shall be signed by the party making them; that copies of said answers be delivered to the undersigned attorneys for plaintiff within fifteen (15) days after the delivery of said interrogatories.

1. Please state your name, age, occupation and residence.

2. If you have stated that you are assistant secretary of defendant corporation, please state the length of time during which you have held that position and, particularly, did you hold said posi-

Plaintiff's Exhibit 59—(Continued)

tion between the 14th day of May, 1946, and the 1st day of July, 1946? [387]

3. Between the days last mentioned, did you receive any direction, verbal or written, from any executive officer of defendant corporation with respect to a pending transaction between plaintiff and defendant, or between J. B. Donnelly and Harold A. Whipple?

4. If so, if you have stated that you did receive any such direction or directions or communications came, please state the name of the party or parties from whom such directions or communications came, the date or respective dates thereof and the contents there. Likewise give the official position and location of the office of said or each of said respective parties.

5. If you have answered the preceding question in the affirmative and any one of said orders or communications was verbal or telephonic, please state the substance thereof, and in case you have made any memorandum relating thereto, give a copy of such memorandum.

6. If any one of said communications or directions was in writing, please attach a copy of the original writing to your answer to this interrogatory.

7. Did you have a telephone conversation with [388] Ralph T. Hymesfeld, secretary of defendant corporation, on or about the 11th day of June, 1946?

Plaintiff's Exhibit 59—(Continued)

8. If your answer to the preceding interrogatory is in the affirmative, please state if this telephone conversation constituted a report made by you to the secretary of defendant corporation of a transaction in Argentine glucose between J. B. Donnelly and Harold A. Whipple, or between plaintiff and defendant in this action.

9. Did you make a written memorandum of the substance of this telephone conversation? If so, attach a copy thereof to this deposition.

10. Did you have a telephone conversation with R. H. Baglin, Assistant in the office of J. B. Donnelly, on or about the 15th day of May, 1946, relative to glucose?

11. If your answer to the foregoing is in the affirmative, give the substance of this conversation, and if you made any memorandum of the substance of the telephone conversation, please attach a copy of said memorandum.

12. Did you have a conversation with said R. H. Baglin, either verbal or by telephone, on or about the 17th day of May, 1946, concerning glucose?

13. If your answer to the preceding interrogatory [389] is in the affirmative, please give the substance of said conversation, and if you had a written memorandum thereof please attach a copy of said written memorandum.

14. Did you have a conversation with said R. H. Baglin, either verbal or by telephone, on or about the 20th day of May, 1946, concerning glucose?

Plaintiff's Exhibit 59—(Continued)

15. If your answer to the preceding interrogatory is in the affirmative, please give the substance of said conversation, and if you had a written memorandum thereof, please attach a copy of said written memorandum.

16. Did you receive from M. B. Seasonwein, vice president of defendant corporation, a communication under date of May 28, 1946, and if you did so receive such a communication, was there attached thereto a letter from one Cooke to R. H. Baglin under date of May 21, 1946?

17. If your answer to the foregoing is in the affirmative, please attach to the answer of this interrogatory a copy of said communication.

18. Did you send to M. B. Seasonwein, on or about June 3, 1946, an answer to his memorandum or letter of May 28, 1946?

19. If your answer to the foregoing is in the affirmative, please attach copy of said answer to [390] M. B. Seasonwein.

20. On or about the 4th day of June, 1946, did you send a memorandum of written communication to R. H. Baglin?

21. If your answer is in the affirmative, please attach a copy of such written communication.

22. Did you, in any oral or written communication to R. H. Baglin, require the delivery to you of the file of R. H. Baglin concerning the Argentine glucose transaction with Harold A. Whipple Co. or plaintiff herein?

Plaintiff's Exhibit 59—(Continued)

23. If the communication was oral or telephonic, please give the substance thereof. If it was written, or if you have a memorandum thereof, please attach a copy of such writing or memorandum.

24. Did you receive said file mentioned in the last two interrogatories from R. H. Baglin, and if so, please state what you did with it.

25. On or about the 5th day of June, 1946, did you receive from G. E. Baglin a three-page memorandum concerning the Argentine glucose transaction?

26. If your answer to this interrogatory is in the affirmative, please attach a copy of said memorandum to this deposition.

27. Did you have a telephone conversation with [391] Harold A. Whipple at Los Angeles on or about the 6th day of June, 1946?

28. If your answer to the last interrogatory is in the affirmative, please state who made the original call, whether Mr. Whipple or yourself, and the substance of that which was said by each party.

29. Did you thereafter, on or about the 7th day of June, 1946, send to Harold A. Whipple a telegram substantially as follows:

June 7, 1946

Harold A. Whipple Co.

316 Commercial Street

Los Angeles, California

Following our telephone conversation of yesterday and in response to your request that said conversa-

Plaintiff's Exhibit 59—(Continued)

tion be confirmed in writing we advise that we are not entering into any agreement with Cia, Engraw Comercial & Industrial S. A. for the purchase of glucose.

SCHENLEY DISTILLERS
CORPORATION

By JAS. E. WOOLSEY,
Assistant Secretary.

30. If your answer to the last interrogatory is in the affirmative, give the name of the executive officer upon whose direction you sent said telegram. In case the direction was in writing, attach hereto a copy thereof. If it was verbal or telephonic, state the date when received by you, the party [392] from whom you received it, his official position and office address, and the substance of that which was stated to you by him.

31. Did you, on or about the 6th day of June, 1946, send to Many Blanc & Co. Inc., a telegram, copy of which is as follows:

Many Blanc & Co. Inc.

3414 West 48th Place

Chicago, Illinois Attention Mr. Bayles

Sample of Argentine glucose being sent to you by Harold A. Whipple Co. Los Angeles. Do not take any action or have any correspondence whatever regarding this sample at any time.

JAS. E. WOOLSEY

32. If your answer to the last interrogatory is

Plaintiff's Exhibit 59—(Continued)

in the affirmative, state the name of the executive officer upon whose direction you sent said wire. In case the direction was in writing, attach hereto copy thereof. If it was oral or telephonic, state the date when received by you, the party from whom received, his office and office address and the substance of that which was stated to you by him.

33. It is noted that on each of said wires there is the notation, "C.H.S. Roma Wine Co., 582 Market Street." Will you please state the significance of that statement on each of said wires? [393]

34. Attach hereto a true and correct copy of any and all reports whatsoever which you have at any time heretofore made of your part in the transaction between defendant and plaintiff or Harold A. Whipple, whether said report is made to any officer, agent or attorney of defendant corporation.

STANTON & STANTON

By /s/ LOUIS B. STANTON"

EXHIBIT 59-A

"Bronson, Bronson & McKinnon

1500 Mills Tower

San Francisco 4, California

Garfield 1-7200

Attorneys for Defendant.

Plaintiff's Exhibit 59-A—(Continued)

In the District Court of the United States for the
Southern District of California Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E IN-
DUSTRIAL S. A., a corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION, a
corporation,

Defendant.

ANSWERS OF JAS. E. WOOLSEY TO INTER-
ROGATORIES ADDRESSED TO HIM BY
PLAINTIFF

The answer of Jas. E. Woolsey to each of the interrogatories addressed to him by plaintiff bears the same number as the corresponding interrogatory. [394]

1. James E. Woolsey, age 43. Residence, 30 Casa Way, San Francisco, California. Occupation, Attorney-at-Law, house attorney for, and Head of Compliance Department of Schenley Distillers Corporation, San Francisco, California, Assistant Secretary of Schenley Distillers Corporation and various of its subsidiaries. I am not an executive officer of Schenley Distillers Corporation.

2. I was elected Assistant Secretary of Schenley Distillers Corporation on August 8, 1945, and

Plaintiff's Exhibit 59-A—(Continued)

assumed the duties of such office on September 21, 1945, and I have continuously held this position since that date.

3. I did receive directions about the pending transaction between the dates May 14, 1946, and July 1, 1946, from Mr. Ralph T. Heymsfeld, who is an attorney-at-law, general counsel for Schenley Distillers Corporation and Secretary of Schenley Distillers Corporation, in his capacity as general counsel of Schenley Distillers Corporation. Mr. Heymsfeld is not an executive officer of Schenley Distillers Corporation.

4. Mr. Milton B. Seasonwein, attorney-at-law, assistant general counsel for and Assistant Secretary of Schenley Distillers Corporation, at defendant's New York Office, who is not an executive officer [395] of Schenley Distillers Corporation, on May 28, 1946, wrote me a letter.

Mr. Ralph T. Heymsfeld, general counsel, located at defendant's New York Office, communicated with me as his assistant, by telephone on June 5, 6 and 11, 1946. This last telephonic communication was confirmed in writing by Mr. Heymsfeld on June 11, 1946.

As to the contents of any of said communications, I decline to answer upon the grounds that these communications and directions were and are privileged communications between the attorneys for the defendant corporation on a legal matter.

5. The directions or communications from Mr.

Plaintiff's Exhibit 59-A—(Continued)

Heymsfeld were telephonic; those from Mr. Seasonwein were in writing. I made a brief memorandum relating to Mr. Heymsfeld's calls of June 5, 6, and 11, 1946. I have Mr. Heymsfeld's letter confirming his June 11, 1946, telephone call.

I decline to state the substance thereof or to attach copies of these documents to this deposition because the same are memoranda of privileged communications between the attorneys for the defendant corporation on legal matters.

6. I decline to attach the copies requested for the reasons stated in answer to Questions No. 4 and [396] No. 5.

7. No, not as Secretary of defendant corporation but as general counsel.

8. My answer to Question No. 7 was not in the affirmative.

9. Yes. I decline to attach a copy for the reasons stated in answer to Questions No. 4 and No. 5.

10. I have no recollection of such a conversation.

11. I can not give the substance of any such conversation and I have no memorandum of its substance.

12. I did not.

13. My answer to Question No. 12 was not in the affirmative.

14. I did not.

15. My answer to Question No. 14 was not in the affirmative.

16. I received a letter from Mr. M. B. Season-

Plaintiff's Exhibit 59-A—(Continued)

wein, who is not a Vice-President of defendant corporation, dated May 28, 1946, attached to which was a letter dated May 21, 1946, from Cooke & Beneman, who are attorneys-at-law, practicing in Washington, D. C.

17. I decline to attach a copy of said communication for the reasons stated in answer to Questions No. 4 and No. 5. [397]

18. Yes.

19. I decline to attach a copy of said answer for the reasons stated in answer to Questions No. 4 and No. 5.

20. I did not. George Baglin, who is an attorney-at-law and was then my assistant in the Compliance Department of defendant corporation at San Francisco, California, did send a written communication to R. H. Baglin on June 4, 1946.

21. I decline to attach a copy of such written communication for the reason that the same is a privileged communication between attorney and client.

2. No. I did, however, on June 5, 1946, instruct my assistant, George Baglin, attorney-at-law, to secure J. B. Donnelly's file on this matter.

23. This question has been answered by my answer to Question No. 22. I have no memorandum of such instructions.

24. I received Mr. Donnelly's file, examined it, and, according to my best recollection, had it returned to Mr. Donnelly.

Plaintiff's Exhibit 59-A—(Continued)

25. Yes.

26. I decline to attach a copy of that memorandum for the reasons stated in answer to Questions No. 4 and No. 5. [398]

27. Yes.

28. I called Mr. Whipple on June 6, 1946, at Los Angeles, and after telling him who I was I told him I was calling for Schenley Distillers Corporation to advise him that Schenley Distillers Corporation would not enter into a contract with Engraw to purchase Argentine glucose. Whipple replied that what I meant was that I was repudiating on Schenley's behalf the contract completed by letter on Schenley's letterhead signed by Donnelly and dated May 23. I told him that Schenley's position was that there was no contract between Schenley and Engraw; that the parties to the proposed contract had never agreed upon specification; that no samples had been approved; that Schenley had never issued any purchase order and that Schenley had not put up the letter of credit and that in our opinion there was no contract and that I was phoning him this information for transmission to Engraw.

Whipple replied that there was damage, that he had acted in good faith upon the written word of a Schenley official upon Schenley's letterhead. I told him Donnelly was not an official of Schenley. He then said that he supposed Schenley could go into court and claim that Donnelly was not an

Plaintiff's Exhibit 59-A—(Continued)

official and [399] had no authority to commit Schenley. I repeated that our position was that we had not approved samples, that we had not issued any purchase order, that we had not furnished or agreed upon specification and had not put up any letter of credit and that there was no contract so far as we were concerned. He then asked me to state in writing that we were repudiating the deal and give our reasons for doing so. I told him that I would transmit his request to the proper person. He again repeated that he had acted in good faith on Donnelly's letter of May 23, and that now he had been advised, presumably by one of Schenley's lawyers, that Schenley repudiated the contract made by Mr. Donnelly. I said I was a member of the Law Department.

He said that he had forwarded to Many Blanc in Chicago the day before a part of the sample that he had of the product; that he had gone to a lot of expense and trouble and that he "smelled a rat" in the deal when Schenley had requested a sample; that undoubtedly Schenley was trying to deal directly in the Argentine market and cut someone out of a commission that had been earned. I repeated our position that there was no contract and again told him the reasons for it. He then repeated his request that Schenley notify him in writing, and I again told him that I [400] would pass his request on to the proper persons. He then asked that Schenley's reasons for repudiation be given in

Plaintiff's Exhibit 59-A—(Continued)

his written notice that it had repudiated the contract.

29. Yes.

30. I did not send this telegram upon the direction of any executive officer of the defendant corporation but at Mr. Whipple's request, with the consent of Mr. Heymsfeld, general counsel for Schenley Distillers Corporation, who is not an executive officer thereof. I told Mr. Heymsfeld of my conversation with Mr. Whipple and of Whipple's request that I communicate in writing with him concerning the conversation. Mr. Heymsfeld said he saw no objection to it and that he thought it was a good idea.

31. Yes.

32. I did not receive any direction from any executive officer or anyone else. I sent it on my own initiative in my capacity as one of the lawyers for defendant corporation.

33. I believe the symbols referred to indicate that the cost of the wire is to be charged to Roma Wine Company's account with the telegraph company.

34. —I decline to attach any such reports as [401] requested for the reasons stated in answer to Questions No. 4 and No. 5.

/s/ JAS. E. WOOLSEY

Plaintiff's Exhibit 59-A—(Continued)

State of California

City and County of San Francisco—ss

Jas E. Woolsey, being first duly sworn, deposes and says that he has read and knows the contents of each of his answers to each of the interrogatories propounded to him by plaintiff and that said answers to each of said interrogatories are true.

/s/ JAS. E. WOOLSEY

Subscribed and sworn to before me this 6th day of February, 1948:

/s/ ALFRED O. MARTIN

Notary Public in and for the City and County of San Francisco, State of California." [402]

Mr. L. B. Stanton: Now I will ask to have introduced into evidence, your Honor, the depositions taken in Buenos Aires of the witnesses Louis Ditisheim, Ricardo Horacio, Norbert Eduardo Auge, Juan Lang, Constantine Negri, Mario Polastri, Rodolfo Guila, and Angel Gabriel. These are probably embraced in one package. Together with the depositions of Dr. Laudislaw Lakatos and Dr. Alberto Padilla. The last two are names of attorneys who gave testimony upon the state of the Argentine law. The first named are those who give testimony with respect to the market value of the glucose markets on the various dates involved in this suit.

There is another matter which I might mention, and that is, one of these witnesses, Juan Lang, is

the one which we asked the permission of the court to take his testimony next week.

The Court: Yes.

Mr. L. B. Stanton: So I do not know whether they desire us to introduce his deposition at this time or defer it to the full time.

Mr. Rowe: Let me understand, is that the gentleman you said would be here on the 9th?

Mr. L. B. Stanton: That is right; that is, he will be here for that purpose on a different branch altogether.

The Court: If he is going to be here why introduce [403] the deposition?

Mr. L. B. Stanton: The particular purpose of his being here is for a different line of questioning.

The Court: Of course, counsel under the rule may object to a deposition where it is stated that the witness is available.

Mr. L. B. Stanton: He is not available at the present time.

The Court: Of course, he will not be available until he gets here. I am not raising an objection.

Mr. L. B. Stanton: There is nothing at all certain that he will be here. Possibly he will be here.

Mr. Bronson: Just a moment. With counsel's suggestion that he is limiting the examination of this witness to other matters than the subjects of the deposition, it is our understanding, we will let the deposition go in.

The Court: What is your desire with regard to the depositions? Are there any objections?

Mr. Bronson: Yes, your Honor, on other scores, on other points.

The Court: Supposing we mark them for identification at the present time and then we will take up the objections.

Mr. Rowe: I would suggest if I may, your Honor, that the questions, as you have said this morning, are sort of pattern questions, the same questions addressed to different [404] groups.

The Court: That is right.

Mr. Rowe: It seems to me that we could identify the depositions by groups and make the objections to the same series of questions asked.

The Court: That is all right.

Mr. L. B. Stanton: That can be readily done.

The Court: That can be done and I do not need to read them now, you see. [405]

The Court: Then, supposing we do this, suppose we receive them in evidence subject to the objections which the counsel are about to make.

Mr. E. B. Stanton: The objections, of course, to these interrogatories have heretofore been settled.

The Court: I am leaving it open to any suggestions that counsel desire to make at the present time. All right. They will be received in evidence and so marked. Now, don't shrug your shoulders in despair. They are received in evidence and I will now proceed to hear any objections to special questions contained in any of the exhibits. All right. Mark them, now.

The Clerk: You will have to give me those names again.

Mr. E. B. Stanton: There is Louis Ditisheim.

The Clerk: Do you wish the interrogatories themselves to go in?

Mr. L. B. Stanton: Yes, the interrogatories and the answers.

The Court: Mark them the same way you had the ones before.

The Clerk: Ditisheim's interrogatories become Plaintiff's Exhibit 60 and the answers 60-A.

The Court: And the answers 60-A, that is right, as long as you have adopted that system.

The Clerk: Yes. [406]

The Court: They are admitted in evidence.

Mr. L. B. Stanton: Does that file there contain the depositions of Padilla and Verela?

The Court: Well, he is taking them individually, so it does not make any difference.

Mr. L. B. Stanton: Well, you see, Padilla and Verela were two attorney witnesses. They are really in rebuttal testimony.

The Court: Oh—why don't we designate those that we take in and exclude those, and we are not taking the entire file. We are taking them individually, and we are wasting time. Take up those that go in first.

The Clerk: Plaintiff's Exhibit 60 in evidence.

The Court: Rather than have a listing from counsel. Call each person as the name appears to you, in the order in which they appear here and

when you get to one of the lawyers, call the name and Mr. Louis Stanton will tell you whether to exclude them or not. Now, what have you done?

The Clerk: Plaintiff's Exhibit 60 has been given to the commission to take deposition on written interrogatories, together with the interrogatories to be propounded.

The Court: All right, that applies to all of them.

Mr. Bronson: It applies to all the proper witnesses, not to the attorneys.

The Court: The first witness is who? [407]

The Clerk: That one is Luis Ditisheim.

Mr. L. B. Stanton: He is okay.

The Court: All right.

The Clerk: That is Plaintiff's Exhibit 60-A in evidence.

Mr. Rowe: Subject to the objections, your Honor.

The Court: That is right, each of them subject to objections to particular questions and answers which I will entertain as soon as we have gone through with this bookkeeping. I think that businessmen think sometimes you can run a court the way they run a factory, but they do not realize how many elements there are in it, human elements and they do not realize why you cannot run it the way they run a factory.

What is the next one?

The Clerk: Norberto Eduardo Auge.

The Court: All right.

Mr. L. B. Stanton: Okay.

The Clerk: His answers are marked Plaintiff's Exhibit 60-B in evidence.

The next answer is by Ricardo Horacio.

Mr. L. B. Stanton: Okay.

The Clerk: His answers are marked 60-C in evidence.

The next is the answers of Mario Polastri.

Mr. L. B. Stanton: Okay.

The Clerk: His answers are marked Plaintiff's 60-D [408] in evidence.

Mr. L. B. Stanton: Okay.

The Clerk: The next are the answers of Juan K. Lang, which are marked Plaintiff's Exhibit 60-E in evidence.

The next answers are those of Angel Gabriel.

Mr. L. B. Stanton: Yes.

The Clerk (Continuing): Which are marked Plaintiff's Exhibit 60-F in evidence.

The next answers are those of Ladislao Lakatos.

Mr. L. B. Stanton: Okay.

The Clerk: Which are marked Plaintiff's Exhibit 60-G in evidence.

The next answers are those of Horacio Varela.

Mr. L. B. Stanton: No. That is an attorney.

The Court: Put that aside.

Mr. Bronson: We have no objection to those going in, even though they are rebuttal, at this time. [409]

The Court: Do you want them in, then?

Mr. L. B. Stanton: Well, the only thing, there is——

Mr. Bronson: That is, if they are offering it now subject to any objections that there may be.

Mr. L. B. Stanton: I think they better go in as rebuttal evidence.

The Court: All right. You have the control, yourself.

The Clerk: The next answers are those of Alberto Padillo.

Mr. E. B. Stanton: That is another attorney.

The Court: All right.

The Clerk: Apparently there are no further answers. That concludes the group.

The Court: All right.

Mr. Rowe: Now, may it please the Court:

The first group of persons to whom some of the questions were addressed consists of witnesses Diti-sheim, Horacio, Auge, Lang and Polastri, and their answers are marked respectively Plaintiff's Exhibits 60-A to 60-E, inclusive.

The Court: All right.

Mr. Rowe: The first question to which—oh, first, your Honor, may I call your attention to a few of the questions and answers given, so I can point up the objections which I have in mind: The first question that raises the point is No. 7: [410]

“Was there a market for glucose made from pure corn syrup, crystal clear, testing between 43° and 45° Baume in Buenos Aires during the years of 1946 to 1947 up to the first of May of that year?”

That is interrogatory No. 7 and the answer is——

Mr. E. B. Stanton: Whose answer?

Mr. Rowe: The witness Ditisheim:

“Glucose is made from maize, not from corn syrup. There was a market for glucose crystal clear testing between 43° and 45° Baume.”

Now, his next question: He is asked:

“Do you know the amount of glucose purchased and sold?”

And he says he does not know.

He is then asked, “If you have answered the preceding interrogatory in the affirmative, please state to your knowledge the market price for each month of the year commencing with the first day of May, 1946, and continuing up to the first day of May, 1947.”——

Mr. L. B. Stanton: Wait a minute until I get that.

The Court: Whose answer are you reading from?

Mr. Rowe: I am going to read from Mr. Ditisheim's, your Honor.

The Court: Ditisheim's, all right.

Mr. Rowe: Now, he has asked, in Interrogatory No. 9: [411]

“If you have answered the preceding interrogatory in the affirmative, please state to your knowledge the market price for each month of the year commencing with the first day of May, 1946, and continuing up to the first day of May, 1947 at the Buenos Aires market for glucose made from pure corn syrup crystal clear testing between 43° and 45° Baume.”

To that interrogatory, he says:

“The market during the months of May and June, 1946 was between 1,15 and 1,25. It went down sharply at the end of June and from June on it has kept round about 60 centavos per kg.”

Now, he is asked:

“Is there any difference between the market price for glucose made from corn syrup for export and that for domestic consumption? If so, state the facts which occasion such difference.”

His answer is:

“There is a difference between the market price for glucose for export to that for domestic consumption, namely, about 15 centavos, which covers the wood tierce and expenses, taxes, etc.”

Now, in 10 he says: “Is there any difference between them and if so, state the facts which constitute the difference.” [412]

Then, he comes in his next answer, he says:

“My answer to point 10 covers this question, namely, that there is a difference of 15 centavos per kilogram composed of 10 centavos per kilogram for the tierce and 5 centavos for taxes and expenses, such as banking expenses, inspection of supervisors, loading on board.”

Now, those answers raise the point that I want to make and I want to move to strike those answers, upon the grounds that each of them is incompetent, irrelevant and immaterial and not responsive to any of the issues made in this case, either under the pleadings or under the testimony which has been adduced up to this point.

The reason for the motion is that in this particular case we are dealing with glucose for export and the only thing that would have any admissibility in this case as to market value would be the market value of glucose for export. Now, he says that there is a difference and, by the way, Mr. Berger said so in his testimony this morning, that there is a difference between the market price for glucose for export and for glucose for domestic consumption.

The situation that develops is that having said that and these witnesses that followed him, and to whom were sent the same interrogatories, each specify the different prices and say what makes it up. [413]

Now, the first point is that the export price is the price with which we are concerned, if we are concerned with any. That has been held most recently I think in a case which is reported in 68 Cal. Ap. (2d. Series) decided in 1945 at page 564.

The case is Boston Iron & Metal Company v. William Rosenthal. In that case upon the issue of damages, there was testimony. I will withdraw that statement.

That case involved a sale of scrap iron for export. A suit was filed by the plaintiff to recover moneys which he alleged the defendant owed him, growing out of the transaction, and the defendant seller countered with a suit for damages for the purchaser's alleged breach of contract.

The judgment went for the defendant seller on this counter claim and the measure of damages was taken to be not the domestic price of scrap iron

but the export price of scrap iron, and between the two, the testimony showed that there was a difference, and the difference was the ultimate figure which was taken in establishing the damage, which was the export price.

Now, so much for the fact that in this case we are concerned with the export price of glucose and not the price in the domestic market which was one of the figures that has been given in this testimony.

The Court: Well, however—— [414]

Mr. Rowe: Now, I am coming to the next point, your Honor, if you will just permit me for a moment.

The Court: Yes.

Mr. Rowe: On the next point, in a fairly recent case decided in 1942, reported in 50 Cal. App. (2d), at page 79, Southern Pacific Milling Company (A corporation) v. Billiwhack Stock Farm Ltd., the court had to do with the measure of damages on the sale of rolled barley. The only testimony as to damages was testimony as to the market value or market price of barley, and the witness who gave the testimony, then, to get them to convert it into rolled barley, did this, according to the case:

“Q. How do you arrive at that price, Mr. Furman?”

That was the question asked.

“A. Because on that date the barley market, the barley was selling and was worth 90 cents a hundred in the valley where it was grown, Santa Inez. Santa Inez is a section where we buy our barley.

We add 10 cents transportation and 10 cents for rolling, a dollar a ton profit, that makes an aggregate of \$23.00."

And that was the basis of his testimony as to the market value of rolled barley.

Now, that is the same system which the plaintiff has adopted in this case.

Now, bear in mind that the plaintiff in this case in the [415] purchase of this glucose, purchased it and sells it to us at a profit. The price which these people fix as the export price of glucose is in bulk. And then they get what they call their export price and they add the cost of barreling and the expenses that are incident to the exportation of the product. That, in the language of this case, we urge is not a proper method of determining what the market price of this glucose was on the dates in question.

The Court: Doesn't that go to the weight, rather than to the admissibility?

Mr. Rowe: This case was reversed because that was the method on which the damages was based.

The Court: Well, was that the only witness?

Mr. Rowe: That was the only testimony. And I am pointing out to you that the testimony of all four of these witnesses follows that same pattern.

The Court: Well, of course I am not bound by rules of testimony followed by the State courts.

Mr. Rowe: I am not urging that. I am simply urging to your Honor that on the question of damages, on the question of measure of damages, the State courts do follow the rule that I am now urging.

Mr. L. B. Stanton: What is that rule?

Mr. Rowe: That rule is that you have got to establish the market value by following the market price of export [416] goods. It is not that you say the export price is sixty or seventy cents and add 10 for barreling and so much for incidentals. You say the purchase price was the export price of glucose. That is glucose in barrels, ready to go.

The Court: I am not familiar with that case, but frankly I can't see its logic, because it goes merely into the reasons. This man starts to tell you how they arrived at it.

Mr. Rowe: That is exactly what this man did.

The Court: How?

Mr. Rowe: That is precisely what this man did.

The Court: The California courts, on the question of value, are among the weakest of the country. They have spun—they have split hairs and, thank goodness, the Supreme Court has said we are not bound by them in condemnation cases, because they have had the most fantastic rules when it came to condemnation. In fact, now all of us here in this District have kicked out the famous rule decided way back in 35 Cal. Appellate, and that is that sales can only be used by way of cross-examination, a rule on which I found myself bound in a decision I wrote in a case, but now we find they bring them in anyway, and the jury doesn't know the difference. If they came in by way of cross-examination, you might as well have them come in the front door and just say the man took into

consideration the sales and what the sales were. So I can't [417] see the logic of a case like that. Suppose a man had just said the market price was such and such and stopped there. Then on cross-examination you would ask him, "How did you arrive at the market price?" He is testifying to a custom of arriving at a price. A formula price is just as good as a price—and he says, "I haven't read the answers, but there is a difference in the price, period", and the way you arrive at it is by adding to whatever their price is on that day, the amount. Then he goes on to say that on the basis of what the price is—then he goes further and says on the basis of that he is not going to give me the formula, but reduces it to a practical figure by giving you what the price was domestically on that day, and answers 15 centavos.

Mr. Rowe: You say you don't understand the logic. I will give you the logic that is in this decision.

The Court: Who wrote that opinion of the Court?

Mr. Rowe: It was the District Courts of Appeal. It was written by Judge Shaw, sitting pro tem.

The Court: Well, he has my respect.

Mr. Rowe: It was concurred in by Shinn and Wood.

The Court: Was a hearing denied?

Mr. Rowe: Petition for a rehearing was denied.

The Court: Well, I have respect for Judge

Shaw. I sat with him not only on the Superior Court but also in our little Supreme Court, for six months, I mean the Appellate Department [418] of the Superior Court. I have great respect for his opinion.

Now, read what it says.

Mr. Rowe: They say, "The witness' first general statement of market price here"—

Bear in mind he stated a flat figure.

"——can have no greater force or effect, even on appeal, than his immediately ensuing explanation of its meaning. According to the explanation, it merely states what would have been the cost to the plaintiff at the time in question of buying whole barley elsewhere, rolling it and transporting it to Santa Paula, with a profit added. What the statute calls for is 'the market or current price.'

" 'Market price' and 'market value' when applied to any article, mean the same thing. They mean the price or value of the article established or shown by sales in the way of ordinary business . . . 'Market value' is the price at which goods are freely offered in the market to all the world."

The Court: Now, that is an entirely different proposition. Is that our volume?

Mr. Rowe: Yes, I borrowed it from your library. I have signed for it.

The Court: No, no. Bring my own copy. Give me 50 Cal. Ap. (2d.). Each of us has a set. [419]

Mr. Rowe: Well, I got that from the library. I read from the last subdivision, your Honor.

The Court: All right. I will read it. You take this and I will take my copy. What is the page again?

Mr. Rowe: Paragraph 8, on page 87 and continuing on page 88.

The Court: All right. Have you concluded?

Mr. Rowe: No. On that particular point.

Now, your Honor, the next plaintiff's interrogatory——

The Court: Well, I am ready to rule on this.

Mr. Rowe: Yes.

The Court: I have not found the section to which the opinion refers. Section 1784 as amended produced the element of damage which is common to all of the Uniform Sales Act. Section 1784:

“Action for damages for nonacceptance of the goods.

(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

(2) (Measure) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question, the measure damages is, in the absence of special circumstances, showing proximate damage of a [420] greater amount, the difference between the contract price and the market or current price at the time or times when the goods

ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept." And so forth.

Now, I think this case can be readily distinguished, because the man added not only actual cost of transportation, but he added a profit; and while here the witness is asked first if there was a difference and what that difference was, and instead of giving it in round numbers, he says, "We take the market price and we add so much for added expenses." He does not speak of a profit and he does not limit it to the market. While here Judge Shaw pointed to the fact that he limited it to profit and further on in the opinion he points to the fact that he was talking about transportation, about the profit and cost of transportation to a certain point:

"According to the explanation, it merely states what would have been the cost to plaintiff at the time in question of buying whole barley elsewhere, rolling it and transporting it to Santa Paula, with a profit added. What the statute calls for is 'the market or current price.' 'Market price' and 'market value,' when applied to any article, mean the same thing. They mean the price or value of the article established or shown by sales in the way of ordinary business. 'Market [421] value' is the price at which goods are freely offered in the market to all the world."

He puts "to all the world" in italics, then he cites a case and then states:

“(emphasis by the court)”

“The evidence quoted does not show that there was an available market, or that there was a current or market price for rolled barley at the time and place of the breach. In the absence of these factors, Section 1784 Civil Code provides other rules for estimating damages, but there is no evidence by which they can be applied.” [422]

I think that that case is not applicable because this man is not asked what it would have cost him. He is asked to stick with the question whether there was a market price, and he is asked if there was any difference, and he said, “Yes,” and then he stated the difference amounts to so much in money which is added to each sale. Therefore he does not limit it as to the particular place to which it is to be transported. He says that we add that to the local price, and for that reason I believe that that case does not apply and the objection to the answer or motion to strike the answer to the interrogatory will be denied.

If you will indicate now the witnesses in whose answers similar answers are found, why, I will state for the record that the ruling will apply to such testimony.

Mr. Rowe: Similar answers, your Honor, maybe not verbatim, but substantially the same answers, will be found in Plaintiff's Exhibits 60-B, 60-C, 60-D, 60-E.

The Court: All right. The ruling will be the same.

Mr. Rowe: Yes, your Honor. The only other point in this particular series of interrogatories or answers, your Honor, has to do with the response of some of these witnesses to a cross interrogatory. These witnesses were asked in the 18th interrogatory——

Mr. L. B. Stanton: 18th cross? [423]

Mr. Rowe: Correct. Were asked in the 18th direct interrogatory:

“Q. Did you have occasion to export any glucose between the 1st day of May, 1946 and the 1st day of May, 1947? If so, give details of operations of such export such as the procurement of any license payment of taxes, and expenses referring to transferring glucose from the domestic to the foreign market.” [424]

They went on to say——

Mr. L. B. Stanton: With reference to what deposition?

Mr. Rowe: Ditisheim. I am talking entirely of Mr. Ditisheim.

The Court: Yes; I have it in front of me.

Mr. Rowe: This witness goes on to say in his answer to that on direct that he did have occasion to export between those dates and that he shipped some to Ireland and some to Sweden. In our cross interrogatory we ask——

Mr. L. B. Stanton: Also to Peru and to Switzerland.

Mr. Rowe: I beg pardon?

Mr. L. B. Stanton: Also to Peru and to Switzerland.

Mr. Rowe: All right. I was not attempting to give them all. In our cross interrogatory we asked this witness——

The Court: I have it before me. Go ahead.

Mr. Rowe: In our cross interrogatory we asked this witness if he had exported any glucose during those periods to give the date on which the license or on which the licenses for export were issued.

The point that revolves around is that under the laws of Argentina an export license, as I am informed, may be granted for a period of as long as six months; and therefore this answer is not responsive to the issues in this case insofar as it pertains to the ability of the plaintiff to perform its contract and secure licenses for the export [425] of glucose, for the reason that all it shows is an exportation of glucose, whereas the material thing is the time at which the license was acquired or secured for the exportation of the glucose. He is very artful. This witness has very artfully dodged that in answering our cross interrogatory. In the answer to the direct interrogatory he has covered certain shipments of glucose.

Mr. L. B. Stanton: What are you referring to?

Mr. Rowe: I am referring to the witness, Mr. Dittersheim—to the fact——

Mr. L. B. Stanton: What cross interrogatory?

Mr. Rowe: To our cross interrogatory. I thought I stated that.

The Court: You are reading that in conjunction——

Mr. E. B. Stanton: The cross interrogatory to question No. 18?

Mr. Rowe: That is right. It is the seventh cross interrogatory.

The Court: Subdivision (d) you mean?

Mr. Rowe: Yes, your Honor. Now, our cross said this:

“(a) Did you actually export any glucose between May 1, 1946 and May 1, 1947?

“(b) If your answer to the foregoing question is yes, was such glucose so sold and exported crystal clear pure corn syrup glucose testing [426] between 43° and 45° Baume?

“(c) For whom and to whom was such or any export sale made and to what country was such or any glucose exported by you? State exact date of each sale, amount of each sale, kind of glucose involved, how it was packed, and the price.

“(d) Please indicate as to each sale whether deliveries were actually made to other countries and export license or export licenses actually issued, and identify the export license or licenses, if any, by date, and number and name of official issuing the same.”

He comes back and says that he can't give that information. He simply says deliveries were made—— [427]

The Court: Doesn't that go to the weight? Because, in other words, you show that his answer could not be correct.

Mr. Rowe: That is right.

The Court: That the answer given on the interrogatory is not correct in the light of the answer he gave to the cross interrogatory. In other words, your claim is that he impeaches himself. Supposing he were on the stand, you would not strike out his testimony. You would merely ask me to disregard it because it is contradictory.

Mr. Rowe: Well, I would press him to have him answer to the date on which he got his export license.

The Court: But that would not strike out the answer he had given before. You are merely working under the limitation of written interrogatories. I will deny the motion.

Mr. Rowe: Those are all the objections we have to the answers to that particular set of interrogatories.

I can handle the other, I think, rather quickly, your Honor. They have been identified as being offered as two sets of answers, one by a witness Gabriel and one by a witness Lokatos, being numbered respectively Plaintiff's Exhibit 60-F and Plaintiff's Exhibit 60-G. The objections I made to the other questions would run likewise to the questions put to these witnesses whose testimony, in the [428] main, deals with the existence of converting bulk glucose at 60 centavos and any other price f.a.s. into f.o.b. In other words, it is an explanation of the difference between bulk glucose and export glucose.

The Court: All right. I have ruled on them and the same ruling will apply. [429]

PLAINTIFF'S EXHIBIT 60

In the District Court of the United States for the
Southern District of California, Central Division
No. 6223-BH

COMPANIA ENGRAW COMERCIAL E IN-
DUSTRIAL S. A., a corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,
Defendants.

Commission to Take Deposition

On Written Interrogatories

The President of the United States of America:

To Any Consul, Vice-Consul, or Consular Agent
of the United States of America, residing in the city
of Buenos Aires, Republic of Argentina, or To
Any Notary Public duly authorized under the laws
of the Republic of Argentina to administer oaths,
Greeting:

Whereas, it appears to the judge of the above
entitled court that there are located within the city
of Buenos Aires, Republic of Argentina, and at the
addresses set opposite their respective names, each
and all of the hereinafter named witnesses, to wit:

Dr. Victor Daniel Goytia, or some attorney in his
office, 501 Av. Roque Saenz Pena;

Dr. Horacio Beccar Varela, or some attorney in
his office, 430 Bartolome Mitree; [430]

Dr. Alberto Padilla, 501 Av. Roque Saenz Pena;

Luis Ditisheim, Reconquista 379;

Ricardo Horacio, Cangello 315;

Plaintiff's Exhibit 60—(Continued)

Norbert Eduardo Auge, Reconquista 379;
Juan Lang, Av. Roque Saenz Pena 615;
Constante Negri, San Martin 233;
Mario Polastri, Av. Roque Saenz Pena 760;
Rodolfo Guila, San Martin 329;
G. Fred Berger, San Martin 329;
Blas Gabriel, or Angel Gabriel, 25 de Mayo;
Laudislaw Lakatos, 25 de Mayo 347; and

Official of the Argentine Government who deals with the export licenses, and that each and all of said persons are material witnesses in a certain action now pending in said court between the above named parties, we, in confidence of your prudence, competence and fidelity, have appointed, and by these presents do appoint you a Commissioner to take the deposition of said witnesses, and therefore we authorize and empower you at certain dates and places to be by you for that purpose appointed, diligently to examine each of said witnesses in answer to the direct and cross-interrogatories annexed to this Commission, and upon the oath of each of said witnesses first taken before you, which oath you are hereby authorized to administer, and cause the said examination of each of the said witnesses to be reduced to writing, [431] cause the same to be read to or by said several witnesses so deposing and subscribed by each of said witnesses and then certify under your seal and signature and make return thereof annexed to this Commission, to the Clerk of the above entitled court at the Fed-

Plaintiff's Exhibit 60—(Continued)

eral Building in the City of Los Angeles, County of Los Angeles, State of California, United States of America, with all convenient speed, enclosed in a sealed envelope directed to said Clerk and forwarded to him by the usual channels of conveyance for mail.

Witness The Honorable Ben H. Harrison, District Judge of the United States, this 6 day of November, 1947, and in the one hundred seventy-second year of the Independence of the United States of America.

EDMUND L. SMITH,

Clerk.

By EDWARD F. DREW,

Deputy Clerk.

Interrogatories numbered one to nineteen both inclusive to be propounded on the part of the Plaintiff to each of the following named witnesses whose addresses are given in the notice to which this is attached.

Luis Ditisheim, Ricardo Horacio, Norbert Eduardo Auge, Juan Lang, Mario Polastri.

1. Please state your name, age, residence and occupation.

2. Please state the length of time in which and the [432] places where you have followed your present occupation, and therein give the extent of the operations of yourself or of any concerns with which you are or have been associated in said occupation or operation.

Plaintiff's Exhibit 60—(Continued)

3. Do you know the parties to the above entitled action or either of them and if so, how long have you known such party or parties?

4. Are you a member of any commodity exchange located in the City of Buenos Aires? If so, give a brief statement of the extent and manner of operation of said exchange and length of time in which you have been a member thereof.

5. Do you know from what raw products glucose is manufactured in Argentine? If so, please state, and if it is within your knowledge, give the annual production of each kind.

6. Do you know the amount of glucose consumption in Argentine per annum, the amount exported, the carry over, and the balance on hand during the years of 1946 and 1947 to date? If so, please give such details as to any of such items as may be within your knowledge.

7. Was there a market for glucose made from pure corn syrup, crystal clear, testing between 43° and 45° Baume in Buenos Aires during the years of 1946 to 1947 up to the first of May of that year?

8. Do you know the amount of glucose purchased and sold [433] either for domestic consumption or for the export during the years of 1946 to 1947 and the prices paid therefor, and the prices for which such glucose was bought and sold? If so, please state.

9. If you have answered the preceding interrogatory in the affirmative, please state to your

Plaintiff's Exhibit 60—(Continued)

knowledge the market price for each month of the year commencing with the first day of May, 1946, and continuing up to the first day of May, 1947 at the Buenos Aires market for glucose made from pure corn syrup crystal clear testing between 43° to 45° Baume.

10. Is there any difference between the market price for glucose made from corn syrup for export and that for domestic consumption? If so, state the facts which occasion such difference.

11. Is there any difference between the market price which you have stated and the price for which such glucose is delivered free on board of ship in the harbor of Buenos Aires? If so, state the facts which occasion such difference and the amount thereof in pesos and centavos.

12. Was all glucose produced to your knowledge during the years 1946 and up to May 1, 1947, made from pure corn syrup crystal clear and testing between 43° to 45° Baume? If not, please state the prices of glucose conforming to other specifications and that conforming to the specifications as stated.

13. In case you have testified that you were familiar with the market and market conditions of the purchase and sale of glucose during the year 1946 and 1947 up to the 1st day of May thereof, please state in detail what, if any, effect it would have had upon said market in case 460 tons of glucose made from pure corn syrup crystal clear and testing between 43° to 45° Baume had been offered

Plaintiff's Exhibit 60—(Continued)

for immediate sale by public vendue in the month of September, 1946.

14. State likewise the effect in like manner of such type of glucose as mentioned in the preceding interrogatory but amounting to 735 tons should be offered for sale in October, 1946, a like offering of 935 tons in November, 1946, and a like offering of 1135 tons in December, January, February, March, or April of 1947. Give in that respect particular details to each of said months as though specifically set forth in a separate interrogatory.

15. Would the fact that said glucose so offered for sale during said months was packaged in wood cooperage containing approximately 660 pounds each have influenced the price at which such glucose could be sold at public vendue?

16. Do you know if in the practice of sales in the Buenos Aires market, it is the custom or practice of dealers to require and transmit with purchases and sales an analysis by a chemical laboratory of the composition and density of said glucose? If so, please state such practice. [435]

17. In your opinion and practice, did the price of glucose other than that complying with the specifications hereinabove noted have any effect upon the market price for crystal clear pure corn glucose testing between 43° to 45° Baume? If so, please state the effect.

18. Did you have occasion to export any glucose between the first day of May, 1946 and the first day

Plaintiff's Exhibit 60—(Continued)

of May, 1947? If so, give details of operations of such export such as the procurement of any license, payment of taxes, and expenses referring to transferring glucose from the domestic to the foreign market.

19. Have you had any experience in the practice of that which is done in the Buenos Aires market in the case of cancellations of contracts of the sale of glucose or other commodities? If so, please state in full the practice of and in said market and custom of dealing and disposing of said glucose or commodities in such cases in said market. Give special attention thereto to the manner of sale or disposition, the investigation of prices, withholding during the period when the market may break and the length of time for which said withholding of the merchandise may be had.

Interrogatories numbered one to seven inclusive are to be propounded to the following named witnesses, whose residences are given in the notice to which this is attached.

Constante Negri, Mario Polastri, Blas or Angel Gabriel, L. Lakatos.

1. Please state your name, age, residence and occupation.

2. Please state the length of time for which and the places where you have followed your present occupation and give the extent of the operation therein of yourself or of any concerns with which you have been or are associated in said occupation or operation.

Plaintiff's Exhibit 60—(Continued)

3. Do you know the parties to the above entitled action or either of them, and, if so, how long have you known such party or parties?

4. Do you have any particular authorization from the government of Argentine or any state or city thereof to follow your business or occupation? If so, state the facts in connection therewith.

5. Do you know the cost of taxes payable and other expenses entailed in transferring commodities from a free at ship side delivery in Buenos Aires harbor to a free on board delivery on ship for export in Buenos Aires harbor?

6. If you have answered the preceding interrogatory in the affirmative, please state such cost, taxes and all other expenses entailed in transferring one (1) ton of glucose made from pure corn syrup crystal clear testing between 43° to 45° Baume packaged in wood cooperage containing approximately 660 pounds each from Buenos Aires or from free at ship side delivery Buenos Aires to free on board delivery on board ship for export in the harbor of Buenos Aires.

7. Do you know the cost of cooperage for one ton of said glucose in the Buenos Aires market and the cost of delivery from the Buenos Aires market to free at ship side delivery; Buenos Aires harbor and the cost of free on board ship delivery Buenos Aires harbor? If so, state such cost in detail giving the items incident thereto.

Interrogatories numbered one through eight both

Plaintiff's Exhibit 60—(Continued)

inclusive are to be propounded to the official in the charge of issuing of export licenses in the Republic of Argentine.

1. Please state your name, age, residence and occupation.

2. Please state the length of time in which you have held your present position and therein give the extent of operations and of your rights and duties under said office.

3. Do you know the party or parties to the above entitled action, and if so, how long have you known such party or parties?

4. In the duties of your office, have you had the occasion during the period commencing with May 1, 1946, to May 1, 1947 to issue or authorize the issuance of any licenses export in glucose?

5. During the period mentioned in the preceding interrogatory, were there any laws, rules, ordinances, regulations, or decrees governing your issuance of licenses? If so, attach to this deposition a true and correct statement and copy thereof.

6. Please state in detail the practice of your office in the issuance of licenses for exports of glucose during the period hereinabove stated, and state any and all licenses for exports thereof which during said period you executed providing said statement is in accordance with the rules of your office.

7. Will you please state if Plaintiff in said action filed application for the issuance of licenses for exports of glucose. If you find that it did,

Plaintiff's Exhibit 60—(Continued)

please attach copy thereof to this deposition. Further, please state what action was taken thereon if said licenses were granted. Attach hereto a true and correct copy of the license or licenses so granted.

8. In respect to all copies which you have attached hereto, have you compared said copies with the originals on file in your office, and in your custody, and are they true and correct copies thereof, and can you, and do you, hereby certify that they are true and correct copies thereof?

Interrogatories numbered one to fifteen, inclusive to be propounded to G. Fred Berger:

1. Please state your name, age, residence and occupation.

2. Are you acquainted with the plaintiff or the defendant in the above entitled action? And if you have stated that you are, please state the length of time for which said acquaintance has continued and the nature thereof.

3. Do you hold any official position in or with plaintiff company? If so, state what position it is, the length of time which it has been held by you.

4. Do you know Harold A. Whipple of Los Angeles, California? If so, state the length of the period of your acquaintance.

5. Did said plaintiff company, to your knowledge, at any time have any business relations with Harold A. Whipple? If so, state the facts relative thereto.

Plaintiff's Exhibit 60—(Continued)

6. In case said dealings were in writing, show to the Commissioner herein the original of said writings and attach to this deposition copy or copies thereof, duly certified by him.

7. Do you know the defendant Schenley Distillers Corporation? If so, state the length of the period of your acquaintance.

8. In case said dealings were in writing, show to the Commissioner herein the original of said writings and attach to this copy or copies thereof, duly certified by him.

9. Subsequent to June 1, 1946, and prior to the 18th day of September, 1946, did you have any dealings with the defendant in this case or any of its officers, or any persons assuming to represent it? If so, detail said dealings, mention therein in each case the date of meeting, parties present, place where the meeting occurred and the substance of that which was said and done at said meetings relative to any glucose purchase.

10. Did your company purchase glucose upon the Buenos Aires market in May of 1946? If so, give details of purchase, that is to say, amounts, specifications and deliveries of any and all purchases made.

11. Did you make an investigation as to the salability of glucose made from pure, crystal clear, corn syrup of density 43° to 45° Baume during the period from May 1, 1946 to May 1, 1947, on the Buenos Aires market? If so, state at length

Plaintiff's Exhibit 60—(Continued)

the nature and facts relative to said investigation.

12. What, if anything, did you do as to disposition of any glucose which you heretofore testified that you held or acquired between the 1st day of May, 1946, and the 1st day of May, 1947.

13. Do you know if there was a market for the purchase and sale of glucose in Buenos Aires during the period between May 1, 1946, and May 1, 1947? If so, please state the facts of your knowledge as to such market.

14. On the 18th of September, 1946, did you give any notice to defendant Schenley Distillers Corporation as to glucose which you had purchased?

15. Deliver to the Commissioner herein for examination, and attach to this deposition copies certified by said Commissioner, of any and all telegrams or correspondence which you may have had with Schenley Distillers Corporation between May 1, 1946, and May 1, 1947.

Plaintiff's Exhibit 60—(Continued)

In the District Court of the United States for the
Southern District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E IN-
DUSTRIAL S. A., a corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION, a
corporation,

Defendant.

CROSS-INTERROGATORIES

Cross-Interrogatories to be propounded to each
of the following named persons:

Luis Ditisheim, Ricardo Horacio, Norbet Eduardo
Auge, Juan Lang, Mario Polastri,
of the city of Buenos Aires, Republic of Argentina,
before a Commissioner to be appointed to take the
deposition of each of said witnesses on behalf of
the plaintiff in the above entitled action.

To Plaintiff's Interrogatory No. 2:

(a) Have you ever been a manufacturer or ex-
porter of glucose?

(b) State all of your prior occupations and the
period of time devoted by you to each.

To Plaintiff's Interrogatory No. 3:

(a) Have you ever been or are you now em-
ployed by or have you ever acted as agent or broker

Plaintiff's Exhibit 60—(Continued)

for or had business relations of any kind or character with either plaintiff or Sociedad Industrial Financiera Argentina or Eugenio Lang or Ricardo Gonzales Y Cia.?

(b) If your answer to the foregoing question is yes, state the name of the person or company and the nature and duration of the relationship.

(c) Are you acquainted with any of the individuals or the officers of any of the companies named in cross-interrogatory (a) to plaintiff's Interrogatory No. 3?

(d) If your answer to the foregoing question is yes, state the names of the individuals or officers of the company and briefly state the nature of your acquaintanceship and for what period of time it has existed.

To Plaintiff's Interrogatory No. 4:

(a) What is a commodity exchange?

(b) How many such exchanges are there in Buenos Aires?

(c) Is each publicly or privately owned?

(d) Are such exchanges competitive?

To Plaintiff's Interrogatory No. 5:

(a) State whether in the Republic or Argentina glucose is manufactured from sugar cane and from beets, and if so, give annual production of glucose from each in the years 1946 and 1947.

To Plaintiff's Interrogatory No. 6:

(a) State also if you know the amount of consumption in the Republic of Argentina per annum,

Plaintiff's Exhibit 60—(Continued)

the amount exported, the carry-over, and the balance on hand during the years 1946 and 1947 to date of glucose made from sugar cane and of glucose made from corn syrup.

To Plaintiff's Interrogatory No. 9:

(a) Give bid and asked range each month in the period from May 1, 1946 to May 1, 1947, on any commodity exchange in Buenos Aires on Argentine glucose of the type and kind of specified in these interrogatories.

To Plaintiff's Interrogatory No. 18:

(a) Did you actually export any glucose between May 1, 1946 and May 1, 1947?

(b) If your answer to the foregoing question is yes, was such glucose so sold and exported crystal clear pure corn syrup glucose testing between 43° and 45° Baume?

(c) For whom and to whom was such or any export sale made and to what country was such or any glucose exported by you? State exact date of each sale, amount of each sale, kind of glucose involved, how it was packed, and the price.

(d) Please indicate as to each sale whether deliveries were actually made to other countries and export license or export licenses actually issued, and identify the export license or licenses, if any, by date, number and name of official issuing the same.

Cross-interrogatories to be propounded to each of the following named persons:

Plaintiff's Exhibit 60—(Continued)

Constante Negri, Mario Polastri, Blas or Angel Gabriel, L. Lakatos, of the City of Buenos Aires, Republic of Argentina, before a Commissioner to be appointed to take the deposition of each of said witnesses on behalf of the plaintiff in the above entitled action:

To Plaintiff's Interrogatory No. 2:

(a) State all of your prior occupations and the period of time devoted by you to each.

To Plaintiff's Interrogatory No. 3:

(a) Have you ever been or are you now employed by or have you ever acted as agent or broker for or had business relations of any kind or character with either plaintiff or Sociedad Industrial Financiera Argentina or Eugenio Lang or Ricardo Gonzales Y Cia.?

(b) If your answer to the foregoing question is yes, state the name of the person or company and the nature and duration of the relationship.

(c) Are you acquainted with any of the individuals or the officers of any of the companies named in cross-interrogatory (a) to Plaintiff's Interrogatory No. 3?

(d) If your answer to the foregoing question is yes, state the names of the individuals or officers of the company and briefly state the nature of your acquaintanceship and for what period of time it has existed.

Plaintiff's Exhibit 60—(Continued)

To Plaintiff's Interrogatory No. 5:

(a) What is the source of your information, if any, given in answer to Interrogatory No. 5?

To Plaintiff's Interrogatory No. 6:

(a) State whether any costs, taxes, or other expenses that you may have given in answer to Interrogatory No. 6 would be varied or diminished in handling single shipments of the described glucose ranging in quantity from 60 tons to 275 tons each.

(b) Please state the items of said costs, taxes and other expenses separately.

(c) Was there any variation or fluctuation in said costs, taxes and/or other expenses during the period May 1, 1946 to May 1, 1947, and if so please set out in schedule form the said variance during said period of time.

Cross-interrogatories to be propounded to the official in charge of issuing of export licenses in the Republic of Argentina, before a Commissioner to be appointed to take the deposition of said witness on behalf of the plaintiff in the above entitled action:

To Plaintiff's Interrogatory No. 2:

(a) State all of your prior occupations and the period of time devoted by you to each.

(b) State who was in charge of any department of the Argentine Government in which you were employed between May 1, 1946 and May 1, 1947,

Plaintiff's Exhibit 60—(Continued)

by name and title. Also state if there were more than one officer or official of said department superior to you, giving the names of any such officers, the title of each, and the duties of each position.

To Plaintiff's Interrogatory No. 3:

(a) Have you ever been or are you now employed by or have you ever represented in any capacity or had private business relations of any kind or character with either plaintiff or Sociedad Industrial Financiera Argentina or Eugenio Lang or Ricardo Gonzales Y Cia.?

(b) If your answer to the foregoing question is yes, state the name of the person or company and the nature and duration of the relationship.

(c) Are you acquainted with any of the individuals or the officers of any of the companies named in Cross-Interrogatory (a) to Plaintiff's Interrogatory No. 3?

(d) If your answer to the foregoing question is yes, state the names of the individuals or officers of the company and briefly state the nature of your acquaintanceship and for what period of time it has existed.

To Plaintiff's Interrogatory No. 4:

(a) In the duties of your office, have you actually, or has your office actually issued or authorized the issuance of any export licenses for glucose during the period May 1, 1946 to May 1, 1947?

(b) In said period of time, has your office actually issued export licenses for crystal-clear pure

Plaintiff's Exhibit 60—(Continued)

corn syrup glucose testing between 43° and 45° Baume?

(c) If your answer to the last question is yes, state what export licenses were issued month by month during the said period for Argentine glucose of the type and grade specified, and also state to what consignees and what countries said exports so licensed were sent.

To Plaintiff's Interrogatory No. 5:

(a) Have you attached all of the laws, rules, ordinances, regulations, decrees and orders, made or promulgated by the Republic of Argentina or any department of said government, applicable to the export and the licensing for export of Argentine glucose of the kind and grade specified? If you have not, please supply all of the same.

(b) State whether there were during the period May 1, 1946 to May 1, 1947, any restrictions, conditions, or limitations, either written or verbal, promulgated or in effect respecting the licensing for export of said Argentine glucose.

(c) Was there in effect during said period any practice in the said departments of said government restricting, conditioning or limiting in any respect the export of said glucose or the licensing thereof.

To Plaintiff's Interrogatory No. 6:

(a) State what person or agency determines the policy and practice, if any, that you have described in answer to Interrogatory No. 6.

Plaintiff's Exhibit 60—(Continued)

(b) State what export licenses of Argentine glucose of the kind and grade specified were issued in each of the months June to December of 1946, inclusive, and further state to what countries said export of said glucose was made under said licenses, if any.

(c) If export licenses of said glucose were issued in each or any of the months June to December, 1946, inclusive, state whether or not exports under said licenses were withheld during the whole or any part of said period.

(d) If under any rule of the office in which you are employed you are unable to supply any of the information required by Interrogatory No. 6, state the name of any person or persons, or any official or officials of your office or any department of the Argentine Government who can supply the information therein required.

To Plaintiff's Interrogatory No. 7:

(a) Did plaintiff file more than one application for issuance of license for export of glucose?

(b) Please attach copies of all said applications.

(c) If said applications do not show upon their face the filing date, please supply from any information available the date of filing of same.

(d) Please state what action was taken upon each and all of said applications, whether license under said licenses were withheld during the whole was granted or was not granted, and the date upon which said action was taken.

(e) Please attach hereto copies of all corre-

Plaintiff's Exhibit 60—(Continued)

spondence between your office or government department, and the plaintiff, and copies of all orders or other communications setting forth the terms and conditions of the order made upon such applications for export licenses, whether the same were granted or not granted.

To Plaintiff's Interrogatory No. 8:

(a) Have you attached hereto all applications, orders, correspondence and other documents bearing upon said applications for licenses by plaintiff to export said glucose during the period May 1, 1946 to December 31, 1946? If not, please supply all thereof.

Cross-Interrogatories to be propounded to G. Fred Berger of the City of Buenos Aires, Republic of Argentina, before a Commissioner to be appointed to take the deposition of each of said witnesses on behalf of the plaintiff in the above entitled action:

To Plaintiff's Interrogatory No. 5:

(a) When did plaintiff company first have business relations with Harold A. Whipple? Describe the nature of said business relations and the continuity thereof up to and including June 7, 1946.

(b) In any and all business transactions between plaintiff company and Harold A. Whipple, state severally in what capacity the said Harold A. Whipple dealt with or represented or acted on behalf of plaintiff company.

Plaintiff's Exhibit 60—(Continued)

(c) In what capacity did Harold A. Whipple act on behalf of plaintiff company in the activities involved in this litigation?

(d) Has Harold A. Whipple acted in similar capacity in other transactions for plaintiff company?

(e) If your answer to the foregoing interrogatory is yes, please indicate the nature and extent of the transactions in which Harold A. Whipple has acted in the capacity described in your answer to Cross-Interrogatory (c) to Plaintiff's Interrogatory No. 5, and attach hereto copies of all correspondence communications, orders, invoices and other writings relative to the said transactions.

To Plaintiff's Interrogatory No. 6:

(a) Have you in response to Interrogatory No. 6 included copies of all communications in writing, by telegram, radiogram or letter, relating to the transaction in this litigation? If not, please include copies of all such communications.

(b) Did you have any telephone conversations with Harold A. Whipple in connection with the matters involved in this litigation? If so, please state the date on which said telephone conversations occurred and give as nearly as you can the substance of each.

To Plaintiff's Interrogatory No. 10:

(a) Were any of such alleged purchases made on or through any commodity exchange? If so, state the names of the commodity exchange or ex-

Plaintiff's Exhibit 60—(Continued)

changes on or through which any such purchases were made, giving the date and quantity purchased on or through said commodity exchange or exchanges and the price at which it was purchased.

(b) If said alleged purchases were not made on or through any commodity exchange, how did the purchase price compare with the bid and ask price, if any, for glucose of the same kind and quality, on a commodity exchange on the date on which any such alleged purchase was made?

(c) Were any such alleged purchases made from or through any of the following persons:

Luis Ditisheim, Ricardo Horacio, Norbert Eduardo Auge, Juan Lang, Mario Polastri?

(d) Were any of the alleged purchases the result of competitive bidding?

(e) Attach hereto all correspondence between the plaintiff and the sellers of said glucose and all bills and invoices respecting the same, all office memoranda of plaintiff bearing upon the alleged purchases of said glucose, and copies of any contracts or purchase of said glucose. Also state in substance, giving the date thereof, any personal or telephone conversation or conversations between plaintiff or any of its agents, officers or employees, and the sellers of said glucose or any of its officers, agents or employees, respecting the alleged purchase and sale of glucose referred to in this interrogatory.

(f) Were all or any of such purchases made subject to prior sale, subject to issuance of a letter

Plaintiff's Exhibit 60—(Continued)

of credit, or subject to any other condition of any kind whatsoever?

(g) State whether any contracts or orders for the purchase of glucose made or entered into by plaintiff company during the year 1946, have been rescinded or cancelled; or whether there has at any time from May, 1946, down to date, been any agreement, writing, conversation or understanding limiting, conditioning, releasing or affecting in any way the alleged purchases of said commodity or the liability of the plaintiff company thereunder. Attach to this deposition copies of any writing last above referred to and give the substance of any conversation, stating the date and persons between whom said conversation was had.

To Plaintiff's Interrogatory No. 11:

(a) In addition to the nature and facts of the alleged investigation, if any, state precisely the sources of all information that may be given in answer to this interrogatory, the names of the persons, the dates and places of the interviews, the documents, records, and other written or published data that may have been examined by you.

(b) Give us precisely the date on which you started this alleged investigation and the date on which you concluded it.

To Plaintiff's Interrogatory No. 12:

(a) Did plaintiff company make any attempt to sell any glucose which it purchased in May, 1946?

Plaintiff's Exhibit 60—(Continued)

If your answer is yes, please state when plaintiff company first attempted to make a sale or other disposition of glucose which it had purchased or acquired in May, 1946, and state what was done.

(b) Over what period of time from May 1, 1946 to December 31, 1946, were attempts made by plaintiff corporation to dispose of said glucose? Please specify in your answer to the last question what attempts were made month by month during the period last mentioned, and also state the persons, firms or corporations with whom any negotiations were had or to whom any offers were made. Also please state whether any offers were made of sales and said glucose acquired during May, 1946, upon any commodity exchange, giving the date and quantity offered upon said commodity exchange and the price at which it was offered.

To Plaintiff's Interrogatory No. 13:

(a) Please state the sources of any information that you have supplied in answer to this interrogatory.

Plaintiff's Exhibit 60—(Continued)

In the District Court of the United States for the
Southern District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E INDUS-
TRIAL S. A., a corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,
a corporation,

Defendant.

NOTICE OF INTENTION TO TAKE DEPOSI-
TIONS OF WITNESSES ON WRITTEN
INTERROGATORIES

To Defendant in the Above Entitled Action and
to Messrs. Bronson, Bronson & McKinnon, attor-
neys for said defendant:

You and Each of You Will Please Take Notice
that plaintiff in the above entitled action, by leave
of court had on the 22nd day of September, 1947,
hereby files the following amendment to written
interrogatories of the following named witnesses:

Dr. Victor Daniel Goytia, or some one of the at-
torneys in his office;

Dr. Horacio Beccar Varela, or some one of the
attorneys in his office;

Dr. Alberto Padilla, or some one of the attorneys
in his office.

Plaintiff's Exhibit 60—(Continued)

1. Please state your name, age, residence, and occupation.

2. Please state length of time in which and the places where you have followed your present occupation and therein give the extent of the operations of yourself or of any firm or office with which you have been associated in such occupation or operation.

3. Please state the names of all colleges which you have attended, degrees which you have attained, date of your admission to the practice of law. If you have heretofore stated you are an attorney, any official position which you have held or do now hold in the government and the general extent of your practice or that of any office in which, or with which, you are or have been connected, particularly relating to the subject of sales of personal property.

4. The defendant Schenley Distillers Corporation has pleaded as one of its defenses that the export of glucose from the Argentine Republic to any other country was specifically prohibited by the laws of the Argentine Republic Numbers 12,591 and 12,831, and Article 14 of Law Number 15,591 and by regulations and orders regularly passed and made thereunder so that it would have been impossible for plaintiff to perform its contract.

Will you please attach to this deposition a copy of each one of said mentioned laws and one copy of each regulation and order regularly passed and made under said respective laws.

Plaintiff's Exhibit 60—(Continued)

The said respective laws and the respective regulations and orders thereunder may be evidenced by an official publication thereof by the Argentine Government, which you can identify in your answer to this interrogatory or by a copy attested by the official having legal custody thereof, or his deputy, and accompanied by a certificate that such official has its custody. All documents must also be authenticated by usual certificate of the consul, vice-consul or consular agent of the United States, stationed in Argentina. There need be only one set of these documents, attached to the answer of one of the answering witnesses. Reference may be made to said set by any other witness.

Unless said respective laws, regulations or orders specifically so provide, will you please state the date when each went into effect, the period of duration of each and whether or no there have been any repeals or other termination of any one or more thereof. In this respect, please identify and attach copies of any and all laws, rules or regulations affecting the effective dates, period of duration or termination or repeal of said laws, regulations, rules or orders, the sources upon which you give your opinion and reasons therefor. Be careful to designate in your answer the particular regulations and orders, if any, passed under each particular law. Said respective laws and the respective regulations and orders thereunder may be evidenced and certified as hereinabove in this interrogatory specified.

Plaintiff's Exhibit 60—(Continued)

5. Were there any laws, rules or regulations other than those hereinabove stated which affected the export of corn syrup glucose of any kind or nature whatsoever during the period of said contract, other than those above stated? If so, attach a copy thereof to your answer to this deposition in form as hereinabove, in interrogatory 4, described.

6. Have there been any interpretations of these or any of the laws, rules or regulations with respect to export licenses by any of the courts, executive or administrative officers of the Argentine Republic relative to the grant or procurement of export licenses during the period of this contract.

7. In case your answer to the foregoing interrogatory is in the affirmative, please state fully such interpretations. If in writing, attach copies thereof, certified as hereinabove, in interrogatory 4, specified.

8. The plaintiff in said action counts upon a contract, the portion of which essential for the purpose of this deposition is set forth in letter of date May 23, 1946, which is attached to the amended complaint on file, as Exhibit "A", and also hereto attached. In your professional opinion, under the provisions of the law applicable to the particular period, from and term of this contract, would it have been legally impossible for plaintiff to have performed the matters and things by it to be performed at the specific times performance thereunder was due?

9. In case you have given your opinion in answer

Plaintiff's Exhibit 60—(Continued)

to the preceding interrogatory herein, please state the reasons for said opinion, and if there have been any decisions in the Argentine courts thereon, please cite such decisions.

10. In your professional opinion, will you please state the difference between a law of the Argentine Republic, a decree thereof, and regulations or orders, and therein state the reasons for your opinion.

11. In case there are found to be variances or conflicts between any of these respective regulations or orders and laws applicable thereto and under which they are made, please state that which in your professional opinion prevails, and in this respect state the reasons for such opinion. In case there have been any court decisions thereon, please cite said decisions.

12. On June 7, 1946, the defendant Schenley Distillers Corporation delivered to plaintiff a telegram stating that it would not enter into any agreement with plaintiff for purchase of glucose. In your professional opinion, under the existing laws of the Argentine Republic, would this fact alter any opinion which you have heretofore in this deposition given?

13. If you have given your opinion in answer to the preceding interrogatory, please state herein the reasons for said opinion and therein cite and set forth any court decisions which you may deem applicable thereto.

Dated: This day of October, 1947.

Plaintiff's Exhibit 60—(Continued)

EXHIBIT "A"

Schenley Distillers Corporation

850-900 Battery Street

San Francisco 11, California

Telephone YUkon 0440

May 23, 1946

Harold A. Whipple Co.

316 Commercial Street

Los Angeles 12, California

Attention: Mr. H. A. Whipple

Gentlemen:

This will confirm our telephone conversation and your letter of May 21st.

We hereby acknowledge the offer of Cia. Engraw Comercial & Industrial S. A., of 600 tons of glucose made from pure corn syrup, crystal clear, and testing between 43 and 45 Baume, at a price of 1.375 pesos per kilogram. The price listed is f.o.b. steamer, Buenos Aires, packages in wood cooperage containing approximately 660 pounds each. Shipment is to be made via McCormick Steamship Co. to San Francisco or Los Angeles.

A purchase order will be sent to Cia. Engraw Comercial & Industrial S. A. as soon as possible covering this purchase, and a letter of credit will be set up to cover the full amount in pesos. Expiration date will be October 30, 1946, or as confirmed. Shipment of this material is to be at a rate of 150 tons a month.

Plaintiff's Exhibit 60—(Continued)

All correspondence will be handled via air mail instead of regular mail in order to speed this matter.

Very truly yours

SCHENLEY DISTILLERS
CORPORATION

/s/ J. B. DONNELLY.

JBD:LP

P. S. Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial S. A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept. 200; Sept.—150; October—275; November—200; December—200. The conditions of acceptance of this quantity are the same as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing.

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PLAINTIFF'S EXHIBIT 60-A

In the District Court of the United States for
the Southern District of California, Central
Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E INDUS-
TRIAL S. A., a corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,

Defendant.

INTERROGATORIES AND
CROSS-INTERROGATORIES

Republic of Argentina,
City of Buenos Aires,
Embassy of the United
States of America—ss.

Deposition of sundry witnesses, taken before me,
Jones R. Trowbridge, Consul of the United States
of America at Buenos Aires, Argentina, under and
by virtue of authority granted by a commission
issued out of the District Court of the United States
for the Southern District of California, Central
Division, in a certain cause pending therein and at
issue between Compania Engraw Comercial e In-
dustrial S. A., a corporation, Plaintiff, and Schenley
Distillers Corporation, Defendants.

Plaintiff's Exhibit 60-A—(Continued)

Dated at Buenos Aires, Argentina, this 5th day of December, 1947.

/s/ JONES R. TROWBRIDGE,

Consul of the United States
of America.

In the District Court of the United States for
the Southern District of California, Central
Division

No. 6223-BH

COMPANIE ENGRAW COMERCIAL E IN-
DUSTRIAL S. A., a corporation,
Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,
Defendants.

INTERROGATORIES and
CROSS-INTERROGATORIES

Deposition of Luis Ditisheim, taken before me, Jones R. Trowbridge, Consul of the United States of America at Buenos Aires, Argentina, at 2:30 p.m. on November 20, 1947, under authority and by virtue of a commission issued out of the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause.

It appearing that the witness, Luis Ditisheim, did

Plaintiff's Exhibit 60-A—(Continued)

well understand the English language, I, Jones R. Trowbridge, Consul of the United States, who also well understand the said language, administered the oath and the interrogatories and cross-interrogatories were put to him in the English language.

The answers of the witness, Luis Ditisheim, to said interrogatories and cross-interrogatories were taken down stenographically by Carlota S. de Lange, of Vidal 1940, Buenos Aires, who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Luis Ditisheim, a witness now to be examined. So help you God.”

Luis Ditisheim of 379 Reconquista, Buenos Aires, Argentina, manager of Sociedad Industrial Financiera Argentina, SIFAR S.A., of Reconquista 379, Buenos Aires, Argentina, 37 years of age, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God,” deposes and says:

Answers by Luis Ditisheim to Interrogatories:

To the First Interrogatory, he says:

Luis Ditisheim, 37 years of age, address Reconquista 379, manager of Sociedad Industrial Financiera Argentina, SIFAR S. A. of Reconquista 379, Buenos Aires.

Plaintiff's Exhibit 60-A—(Continued)

To the Second Interrogatory, he says:

I have been during the last five years manager of the Sociedad Industrial Financiera Argentina SIFAR S. A. and have not been associated with any other concern during the past 17 years. Our firm deals as exporters of raw materials and food stuffs with an average turnover of about 5,000,000 pesos.

To the Third Interrogatory, he says:

I have known Compania Engraw Comercial e Industrial S. A. since May 1946. I have known Schenley Distillers Corporation by reputation since many years. I have met Mr. Dichter who said to be the firm's South American representative and who paid me several visits during the second part of 1946 in connection with this business and in company of Mr. Fred Berger of Compania Engraw Comercial e Industrial S. A.

To the Fourth Interrogatory, he says:

I am a member of the Bolsa de Comercio de Buenos Aires, since about 3 years. The Bolsa de Comercio is a very well known Institution; I submit a Bulletin marked Exhibit "A." The Bolsa de Comercio is by far the largest institution of its kind in South America and includes among other things, the stock exchange of this City and the future grain market.

To the Fifth Interrogatory, he says:

All the glucose manufactured in this country is

Plaintiff's Exhibit 60-A—(Continued)

made from maize. I do not know the exact production; in my own opinion it is about 30,000 tons yearly.

To the Sixth Interrogatory, he says:

I do not know the amount of glucose consumption in Argentina. The total export of 1946 is of about 8,000 tons, gross weight equal to 7,000 tons net weight. I do not know the balance on hand during the years of 1946 and 1947 to day, but it is something well known that the balance on hand has been increasing considerably since the second part of 1946 as foreign buyers have withdrawn on account of the enormous crop of maize in the U. S. A. which has brought down considerably the price of glucose and the interest for this commodity from Argentina.

To the Seventh Interrogatory, he says:

Glucose is made from maize not from corn syrup. There was a market for glucose crystal clear testing between 43° and 45° Baume.

To the Eighth Interrogatory, he says:

I do not know the amount of glucose purchased and sold either for domestic consumption or for export during 1946 and 1947. The price of glucose during this period was of between 55 and 60 centavos per kg.

To the Ninth Interrogatory, he says:

The market during the months of May and June 1946 was between 1,15 and 1,25. It went down

Plaintiff's Exhibit 60-A—(Continued)

sharply at the end of June and from June on it has kept round about 60 centavos per kg.

To the Tenth Interrogatory, he says:

There is a difference between the market price for glucose for export to that for domestic consumption, namely about 15 centavos, which covers the wood tierce and expenses, taxes, etc.

To the Eleventh Interrogatory, he says:

My answer to point 10 covers this question, namely that there is a difference of 15 centavos per kg composed of 10 centavos per kg for the tierce and 5 centavos for taxes and expenses, such as banking expenses, inspection of supervisor, loading on board.

To the Twelfth Interrogatory, he says:

All the glucose produced to my knowledge during the years of 1946 and up to May 1, 1947, was made from maize and was crystal clear and testing between 43° and 45° Baume.

To the Thirteenth Interrogatory, he says:

The effect would have been to accentuate the demoralization of the market which was falling under the pressure of the record maize crop in the U. S. A.; in other words the effect would have been to bring the price still very much lower and therefore diminish the value of all stocks of glucose available at that time. It is not usual on this market to sell such goods in public auction. It can safely said that buyers could only have been found

Plaintiff's Exhibit 60-A—(Continued)

at ridiculous low prices in selling that way. In fact, for this very reason Sociedad Industrial Financiera Argentina SIFAR S. A., which brought an arbitration suit against Compania Engraw Comercial e Industrial S. A., did not insist on the glucose not received by Compania Engraw Comercial e Industrial S. A. to be sold in public auction, because it would have taken off to the bottom of the market.

To the Fourteenth Interrogatory, he says:

It is impossible to state with accuracy what the result might have been. I can only say to the best of my judgment that such a sale would have in any case and at any time have been made in a very unfavourable way and so much the worse if the quantity was larger and larger.

To the Fifteenth Interrogatory, he says:

Yes adversely, because local users buy glucose in bulk or in steel drums of 200 kgs which are afterwards returned to the manufacturer and remain his property. Should they buy glucose in tierces it would mean additional trouble to break up the tierces which would have been of no commercial value to them.

To the Sixteenth Interrogatory, he says:

It is often done but not always. Buyers who have already bought previously do not usually ask for such an analysis, because they know that the standard of Argentine glucose is very even and that it meets the requirements of the U. S. Pharmacopea.

Plaintiff's Exhibit 60-A—(Continued)

It must be said that there are only two manufacturers of glucose in Argentina, both of them considered as reliable.

To the Seventeenth Interrogatory, he says:

No, because to any practical purpose there is no other glucose in Argentina than crystal clear pure corn glucose testing between 43° and 45° Baume.

To the Eighteenth Interrogatory, he says:

We have exported during this period 600 longtons to Ireland, also some smaller lots to Peru and to Switzerland. We also shipped some 300 tons to Sweden. Export licenses have been forthcoming and we have paid the usual tax of .5% for same. For exports since the month of November 1946 we have also had to deliver to the Government, the equivalent of 1% of the maize used in the making of the glucose exported which we had to buy on the free market and give up at an official set lower price. Our shipments to Ireland, Switzerland and Peru took place during the months of July, September, November and December 1946. Our shipment to Sweden took place in April 1947. We also paid the sales tax of 1.25% of the glucose exported and stevedoring expenses.

To the Nineteenth Interrogatory, he says:

In cases of contracts celebrated on official forms of the Bolsa de Comercio, it is a contract obligation to go to arbitration in case of non fulfillment of contract or of unilateral cancellation, which in my

Plaintiff's Exhibit 60-A—(Continued)

opinion comes to the same thing. Each party nominates an arbitrator and both arbitrators appoint a third one who is called upon when the two first arbitrators cannot agree to give the final verdict. If any of the parties does not comply with this verdict, the other party may apply to the Bolsa de Comercio for an official copy of this verdict and this can be produced before a law court in order to initiate legal proceedings against the other party. Before the judgment of the arbitrators has been given, the parties have not the free disposition of the goods. Therefore the goods cannot be disposed of in any way until the judgment of the arbitrators has been made known. The arbitrators are free to chose any proceeding they feel fit to decide on prices. Arbitrators have no executive functions and limit themselves to say, who is wrong, and how much. Once the judgment of the arbitrators is made public, it is exclusively the business of the party which has suffered the damage, to dispose of the goods in the best possible way.

Answers by Luis Ditisheim to Cross-Interrogatories:

To the First Cross-Interrogatory (to Plaintiff's Interrogatory No. 2) he says:

- (a) Exporter yes; manufacturer no.
- (b) Seventeen years with present employer.

To the Second Cross-Interrogatory (to Plaintiff's Interrogatory No. 3) he says:

Plaintiff's Exhibit 60-A—(Continued)

(a) I have been employed and still am exclusively by Sociedad Industrial Financiera Argentina SIFAR S. A. My firm maintains good business relations with Eugenio Lang S.R.L. and with R. H. Gonzalez y Cia. and with the Plaintiff.

(b) I have been employed with Sociedad Industrial Financiera Argentina SIFAR S. A. and during the last five years I have been manager in said firm. Our firm has maintained business relations with Eugenio Lang S.R.L. for the last five years, with R. H. Gonzalez y Cia. for the last two years, with the Plaintiff for the last two years.

(c) Yes, although this acquaintance is purely commercial between our firms and not of a private character.

(d) I repeat that my acquaintance with these firms and their officials has been purely on the commercial level. I know personally Mr. Juan Lang and Mr. Eugenio Lang of Eugenio Lang S.R.L.; Mr. Ricardo Gonzalez of the firm R. H. Gonzalez y Cia.; Mr. Fred Berger of Compania Engraw Comercial e Industrial S. A.

To the Third Cross-Interrogatory (to Plaintiff's Interrogatory No. 4) he says:

(a) It is a place where goods are bought and sold.

(b) Two.

(c) Privately.

(d) No. The Bolsa de Comercio is by far the most important; the other Bolsa de Cereales, is restricted to spot lots of of cereals.

Plaintiff's Exhibit 60-A—(Continued)

To the Fourth Cross-Interrogatory (to Plaintiff's Interrogatory No. 5), he says:

(a) No glucose is made here except from maize.

To the Fifth Cross-Interrogatory (to Plaintiff's Interrogatory No. 6), he says:

(a) I repeat only corn glucose is made in this country and I do not know the amount of consumption in the Argentine Republic nor the carry-over or the balance on hand during the years 1946 and 1947 to date. The export of glucose in 1946 was of about 8,000 tons, gross weight—7,000 net weight. I repeat there is no glucose made in Argentina from sugar cane.

To the Sixth Cross-Interrogatory (to Plaintiff's Interrogatory No. 9), he says:

(a) Glucose is not an item on which the prices of transactions are published. The contracts registered at the Bolsa de Comercio for glucose are never made public.

To the Seventh Cross-Interrogatory (to Plaintiff's Interrogatory No. 18), he says:

(a) Yes.

(b) Yes.

(c) Most of the details asked for under this point have been answered in Plaintiff's Interrogatory No. 18.

(d) Licenses are issued by a Government office called Secretaria de Industria e Comercio, Direccion de Importacion y Exportacion. Such licenses have

Plaintiff's Exhibit 60-A—(Continued)

to be surrendered once shipment has taken place; therefore it is not possible to give the information asked for in this point. Deliveries actually took place and of course the export licenses have actually been issued, as otherwise the merchandise could not have been shipped.

PLAINTIFF'S EXHIBIT No. 60-B

In the District Court of the United States for the
Southern District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E INDUSTRIAL S.A. a Corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,

Defendants.

INTERROGATORIES AND CROSS-
INTERROGATORIES

Deposition of Norberto Eduardo Auge, taken before me, Jones R. Trowbridge, Consul of the United States of America at Buenos Aires, Argentina, at 10 a.m. on November 21, 1947, under authority and by virtue of a commission issued out of the District Court of the Southern District of California, Central Division, in the above-entitled cause.

Plaintiff's Exhibit 60-B—(Continued)

It appearing that the witness, Norberto Eduardo Auge, could not intelligently testify in the English language and did well understand the Spanish language, one Clara Robine, of Avda. R. Saenz Pena 530, Buenos Aires, Sworn Public Translator, who also well understands the Spanish and English languages, was employed as interpreter and was sworn in as follows:

“You do solemnly swear that you know the English and the Spanish languages and that you will truly and impartially interpret the oath to be administered and interrogatories and cross-interrogatories to be asked Norberto Eduardo Auge, a witness, now to be examined, out of the English into the Spanish language, and that you will truly and impartially interpret the answers of the said Norberto Eduardo Auge thereto out of the Spanish language into the English language. So help you God.”

and said Clara Robine interpreted accordingly.

The answers of the witness, Norberto Eduardo Auge, to said interrogatories were taken down stenographically by Carlota S. de Lange, of Vidal 1940, Buenos Aires, who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Norberto Eduardo Auge, a witness, now to be examined. So help you God.”

The notes were then forthwith transcribed by her under my direction and the said transcript be-

Plaintiff's Exhibit 60-B—(Continued)

ing then read over carefully to the said witness by me was then signed by the said witness in my presence.

Norberto Eduardo Auge of Reconquista 379, Buenos Aires, Argentina, partner of Auge Freres y Cia., S.R.L., Industrial y Comercial, Reconquista 379, Buenos Aires, Argentina, 40 years of age, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God.”

deposes and says:

Answers by Norberto Eduardo Auge to Interrogatories.

To the First Interrogatory, he says:

Norberto Eduardo Auge of Reconquista 379, partner of Auge Freres y Cia., S.R.L., Industrial y Comercial, 40 years of age.

To the Second Interrogatory, he says:

My firm started business in 1935 under the title Auge Freres; in 1938 the contract was modified and the name changed to Auge Freres y Cia.; in the present year 1947, the Company was changed from a common partnership to a limited liability Company with a capital of 1.000.000 pesos Arg. cur. In 1938 the firm added to its business export and import trade. The aggregate operations of this Com-

Plaintiff's Exhibit 60-B—(Continued)

pany are yearly about 15 to 20.000.000 pesos Arg. cur.

To the Third Interrogatory, he says:

I have known the firm Schenley Distillers Corporation by name for many years and the firm Companie Engraw Comercial e Industrial S.A. for more or less two years.

To the Fourth Interrogatory, he says:

I am a member of the Bolsa de Comercio de Buenos Aires. I am a member since 1945 but my partner Luciano Alfredo Auge has been a member for many years. I don't remember how long the Bolsa de Comercio sponsors most of the transactions for the purchase and sale of products in Buenos Aires. It has special forms for purchase and sale where the names of vendors and purchasers are stated as well as the terms accepted by both of them. The triplicate of said form is registered and kept in file by the Bolsa de Comercio. I attach a copy of such a form marked Exhibit "A."

To the Fifth Interrogatory, he says:

The one product used in Argentina for the manufacture of Glucose is maize.

To the Sixth Interrogatory, he says:

I believe the production of glucose from maize in Argentina is from 35 to 40.000 tons yearly. I have no knowledge of the domestic consumption but the total exports of 1946 being approximately 7.000 tons net, I believe that the balance cannot possibly be absorbed by local consumption, and on our side

Plaintiff's Exhibit 60-B—(Continued)

we still have in stock the 75 tons which we had sold to Compania Engraw Comercial e Industrial S.A.

To the Seventh Interrogatory, he says:

Yes. There was a market for glucose manufactured from pure corn syrup of said classification but very weak for lack of purchasers abroad, during 1946 up to May, 1947.

To the Eighth Interrogatory, he says:

I have no knowledge of local consumption and the fact that from the exports during 1946 over a total of 7.000 tons nett only 2.600 tons nett have been exported during the second half of 1946, proves that the market was weak. As to the figures for 1947 I am not aware of them yet. I cannot give a precise detail of the prices, but I can state that at the time we sold the glucose to Compania Engraw Comercial e Industrial S.A., (the price for export was \$1.20 Arg. cur. and at the time of delivery) [E. Auge (signed) JRT (initialed)] the price for it on this market was 55 to 57 centavos Arg. cur. per kg.

To the Ninth Interrogatory, he says:

I cannot give the detail month by month, but I can state that during the second half of 1946 and the present year the price for glucose of said classification has been from 55 to 57 centavos Arg. cur. per kg with a tendency to become lower. Confirming this statement I wish to add that we have lately sold to Great Britain a shipment of maize

Plaintiff's Exhibit 60-B—(Continued)

glucose at the price of 53 centavos Arg. cur. per kg.

To the Tenth Interrogatory, he says:

There is no established difference between the prices all depending on the demand of the respective market.

To the Eleventh Interrogatory, he says:

The difference between the price of glucose sold locally or delivered abroad is due to the fact that the glucose for export has to be packed in barrels and pays duties and export taxes to which we should add the cost of transportation to the port of Buenos Aires; the total of such additional expenses is about 15 to 16 centavos Arg. cur. per kg.

To the Twelfth Interrogatory, he says:

All glucose produced during 1946 up to May 1, 1947, was manufactured from pure corn syrup crystal clear, testing between 43° to 45° Baume.

To the Thirteenth Interrogatory, he says:

The market being weak, to offer 460 tons of glucose from pure corn glucose crystal clear classified between 43° and 45° Baume for immediate sale in public vendue in September, 1946, would have been simply disastrous and would have produced an extraordinary lowering of the prices in the market.

To the Fourteenth Interrogatory, he says:

The result of such offers would have made more serious the disastrous situation.

Plaintiff's Exhibit 60-B—(Continued)

To the Fifteenth Interrogatory, he says:

The packing in barrels would not have favoured the public vendue, because the local consumers who would have been at the moment the only purchasers, would have had no interest in the barrels since they usually receive the product in bulk which goes direct to the tanks.

To the Sixteenth Interrogatory, he says:

It is done sometimes but not compulsorily. There being in Argentina only two manufacturers of glucose we know the product and generally we do not require the chemical analysis; the product meets with the requirements of the U. S. Pharmacopea.

To the Seventeenth Interrogatory, he says:

No other glucose is manufactured in Argentina.

To the Eighteenth Interrogatory, he says:

We have exported glucose between May 1, 1946, and May 1, 1947. The amounts exported are as follows: March 9, 1946, 99,909 kg—June 4, 1946, 22,006 kg—January 7, 1947, 10,000 kg—January 7, 1947, 9,775 kg—January 25, 1947, 29,896 kg. The purchase prices varied from 55 to 57 centavos Arg. cur. per kg and the foreign purchases were from several countries including the U.S.A. The obtainment of export permits is done without difficulty. Taxes and other costs total apuroximately 4% of the value of the merchandise.

To the Nineteenth Interrogatory, he says:

Sales contracts being signed on Bolsa de Comer-

Plaintiff's Exhibit 60-B—(Continued)

cio forms, any of the parties failing to fulfill his obligation, the other party may present his claim to said institution. For more details I attach herewith the provisions of the Bolsa de Comercio for cases of unfulfilment marked exhibit "B." In case the award of the Bolsa de Comercio arbiters is not fulfilled, the plaintiff may apply to the Commercial Court, in order to obtain the enforcement of the award. In case the contracts are not signed through the Bolsa de Comercio, the case should be submitted directly to the Commercial Court. When the unfulfilment is on the part of the purchaser, the cancellation of the contract is requested from the judge and also the plaintiff applies to the judge to get an authorization for selling the merchandise in public auction. The difference between the price obtained in the public auction and the price fixed in the contract is the compensation to damage, which the vendor can obtain in Court. There is no definite time for the disposal of the merchandise. It varies from one month to one year; all depends on the discretion of the judge who choses the moment and the date.

Answers by Norberto Eduardo Auge to Cross-Interrogatories:

To the First Cross-Interrogatory (to Plaintiff's interrogatory No. 2), he says:

(a) I am an exporter and have made local sales, but I am not a manufacturer of glucose.

(b) We devote to exportion since 1938 and be-

Plaintiff's Exhibit 60-B—(Continued)

fore that have acted as representatives for foreign firms.

To the Second Cross-Interrogatory (to Plaintiff's Interrogatory No. 3), he says:

(a) I have not been employed or acted as agent or broker of any of said firms, but I have had business relations as a colleague with Sociedad Industrial Financiera Argentina SIFAR S.A., Eugenio Lang S.R.L. and Compania Engraw Comercial e Industrial S.A.

(b) In Sociedad Industrial Financiera Argentina SIFAR S.A. I know Mr. Ditisheim and Mr. Tilmant, and in Eugenio Lang S.R.L. I know Mr. Eugenio Lang and Mr. Juan Lang, and from Compania Engraw Comercial e Industrial S.A. I know Mr. Berger. I have known these gentlemen for some years and in matters dealing with commercial business.

(c) I answered this already under point (b).

(d) Also answered under point (b).

To the Third Cross-Interrogatory (to Plaintiff's Interrogatory No. 4), he says:

(a) It is an association of traders with the purpose of selling and exchanging commodities.

(b) Two.

(c) Privately owned.

(d) They are not competitive.

To the Fourth Cross-Interrogatory (to Plaintiff's Interrogatory No. 5), he says:

Plaintiff's Exhibit 60-B—(Continued)

(a) No glucose is manufactured from sugar cane or from beets.

To the Fifth Cross-Interrogatory (to Plaintiff's Interrogatory No. 6), he says:

(a) During 1946, 7.000 tons nett approximately of glucose from corn syrup have been exported. I am not aware of the other points of the interrogatory.

To the Sixth Cross-Interrogatory (to Plaintiff's Interrogatory No. 9), he says:

(a) I cannot give any precise answer due to the fact that transactions in maize glucose are secret and we cannot get information from commodity exchanges.

To the Seventh Cross-Interrogatory (to Plaintiff's Interrogatory No. 18), he says:

(a) Yes.

(b) Yes.

(c) The sales were made to several countries. March 9, 1946, 99.909 kg and June 4, 1946, 22.006 kg exported to the U.S.A.; the selling price for said quantities was 96 centavos Arg. cur. per kg CIF. January 7, 1947, 9.775 kg to Bolivia at 1,10 pesos Arg. cur. per kg CIF. January 7, 1947, 10.000 kg to Bolivia at 1,30 pesos Arg. cur. per kg CIF. January 25, 1947, 29.896 kg to Cuba at 75 centavos Arg. cur. per kg CIF. Such prices include all expenses plus commissions to the selling agents abroad. Besides prices obtained in Bolivia may be

Plaintiff's Exhibit 60-B—(Continued)

considered as exceptional, because the quantities were very small and therefore the prices did not conform exactly to the standard established. The nett selling price to the foreign purchasers varied in said operations from 60 to 70 centavos Arg. cur. per kg.

(d) Deliveries were actually made to other countries and export licenses were actually issued. As to the other point of the interrogatory I cannot give any precise data since export licenses were returned to the Direccion de Importacion y Exportacion of the Secretaria de Comercio y Industria after fulfilling the delivery.

/s/ CLARA ROBINE,

Interpreter.

/s/ E. AUGE,

NORBERTO EDUARDO

AUGE,

Witness.

/s/ JONES R. TROWBRIDGE,

Consul of the United States
of America.

PLAINTIFF'S EXHIBIT No. 60-C

In the District Court of the United States for the
Southern District of California,
Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E IN-
DUSTRIAL S.A., a Corporation,
Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,
Defendants.

INTERROGATORIES AND CROSS-
INTERROGATORIES

Deposition of Ricardo Horacio (full name Ricardo Horacio Gonzalez), taken before me, Jones R. Trowbridge, Consul of the United States of America at Buenos Aires, Argentina, at 2:30 p.m. on November 21, 1947, under authority and by virtue of a commission issued out of the District Court of the Southern District of California, Central Division, in the above-entitled cause.

It appearing that the witness, Ricardo Horacio Gonzalez, could not intelligently testify in the English language and did well understand the Spanish language, one Clara Robine, of Avda. R. Saenz Pena 530, Buenos Aires, Sworn Public Translator, who also well understands the Spanish and English languages, was employed as interpreter and was sworn in as follows:

Plaintiff's Exhibit 60-C—(Continued)

“You do solemnly swear that you know the English and the Spanish languages and that you will truly and impartially interpret the oath to be administered and interrogatories and cross-interrogatories to be asked Ricardo Horacio Gonzalez, a witness, now to be examined, out of the English into the Spanish language, and that you will truly and impartially interpret the answers of the said Ricard Horacio Gonzalez thereto out of the Spanish language into the English language. So help you God.”

and said Clara Robine interpreted accordingly.

The answers of the witness, Ricardo Horacio Gonzalez, to said interrogatories were taken down stenographically by Hella J. de Irniger, of Santa Rosa 2418, Florida F.C.C.A., who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down into notes and faithfully transcribe the testimony of Ricardo Horacio Gonzalez, a witness, now to be examined. So help you God.”

The notes were then forthwith transcribed by her under my direction and the said transcript being then read over correctly to the said witness by me was then signed by the said witness in my presence.

Ricardo Horacio Gonzalez of Cangallo 315, Buenos Aires, Argentina, exporter of Argentine commodities, 67 years of age, being by me first duly sworn as follows:

Plaintiff's Exhibit 60-C—(Continued)

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God.”

deposes and says:

Answers by Ricardo Horacio Gonzalez to
Interrogatories

To the First Interrogatory, he says:

Ricardo Horacio (full name Ricardo Horacio Gonzalez), 67 years of age. Residence: Buenos Aires, Cangallo 315. Occupation: Exporter of Argentine commodities.

To the Second Interrogatory, he says:

Forty years in Buenos Aires as an exporter of Argentine commodities; working in raw material in the Capital for export, with an average in export of one million Argentine pesos per annum. In forty years of dealing in this occupation I have business connections with many firms in Argentina especially with those dealing in raw material. I act as a titular of the firm R. H. Gonzalez & Cia., exporters.

To the Third Interrogatory, he says:

I have known the plaintiff for about two years and I do not know the defendant in this case.

To the Fourth Interrogatory, he says:

I am a member of the Bolsa de Comercio of Buenos Aires since 1910. The Bolsa de Comercio is

Plaintiff's Exhibit 60-C—(Continued)

a private institution which includes the majority of the traders in this line of business; it is a place where there are meetings in which they carry on business and consider any offers related with the matter. The number of the members of the Bolsa is about 4900, and my number as a member is No. 182.

To the Fifth Interrogatory, he says:

All glucose manufactured in Argentina is made from maize. I do not know exactly the annual production, but my own estimation is that approximately 35 to 40,000 metric tons are manufactured per year.

To the Sixth Interrogatory, he says:

I do not know exactly the amount of glucose consumed in Argentina, but I think that this is the difference between the estimated production and the amount exported. In accordance with my estimation and the reports published during 1946 the amount exported was more or less 8000 metric tons. In the first semester of 1947 it was around 6000 metric tons. I do not know [492] the amount carried over because usually the glucose which is not sold either for export or internally is kept in warehouse and the amount is not known to the public.

To the Seventh Interrogatory, he says:

Glucose is in itself a pure corn syrup crystal clean testing between 43-45° Baume and no other glucose is made in Argentina. During the period 1946 up to May 1947 there was hardly any bid for

Plaintiff's Exhibit 60-C—(Continued)

glucose, the market being very weak especially for exportation.

To the Eighth Interrogatory, he says:

I could not say precisely the amount of glucose bought and sold either for local consumption or for exportation during the years 1946 and 1947. The amount sold for exportation can only be known when deliveries are actually made, which is known from shipping reports when published, according to my answer to interrogatory No. 6. As to the prices paid for exportation they have been from 1.20 Argentine pesos per kilo to 0.50 cents Argentine currency, the market declining continually.

To the Ninth Interrogatory, he says:

I could not say any precise amount for each month since the market was so weak that during some of the months there were no operations at all, but I recall [493] that since May 1946 when the price was 1.20 Argentine currency per kilo it went down during the six following months to 0.60 cents Argentine currency and later up to May 1947 it was difficult to sell even at 0.50 cents Argentine currency. All the preceding data refer to pure corn glucose crystal pure testing from 43-45° Baume.

To the Tenth Interrogatory, he says:

The price for glucose for local consumption is generally lower than for exportation; one of the reasons being that local consumers generally return the containers and besides glucose for exportation

Plaintiff's Exhibit 60-C—(Continued)

incurs in expenses for transportation and port duties which is not the case for internal consumption.

To the Eleventh Interrogatory, he says:

The difference in price, as already explained in my answer to interrogatory No. 10, is about 0.15 Argentine currency per kilo.

To the Twelfth Interrogatory, he says:

As I have already said before, no glucose is produced in Argentina except pure corn glucose testing from 43-45° Baume.

To the Thirteenth Interrogatory, he says:

The effect of an offer of 460 tons of glucose produced from maize crystal clear and classified [494] between 43-45° Baume for auction sale in September 1946, would have caused a still greater depression in prices which might have been about 30 or 40%.

To the Fourteenth Interrogatory, he says:

I think it would have been impossible to sell such large quantities in such a weak market.

To the Fifteenth Interrogatory, he says:

The question of the containers would have had no importance whatsoever. Eventual purchasers would have had in mind the product itself and not the containers.

To the Sixteenth Interrogatory, he says:

It is an optional practice on the part of the pur-

Plaintiff's Exhibit 60-C—(Continued)

chasers to require an analysis as to determine the composition and density of glucose, but it is not customarily done when dealing with well known brands.

To the Seventeenth Interrogatory, he says:

I am not aware that there were on the market any other types of glucose.

To the Eighteenth Interrogatory, he says:

Only in April 1947 we had made a small sale of about 20 tons of glucose for export to Uruguay, at 0.60 cents Argentine currency per kilo F.O.B., all costs included, i.e. taxes and transportation costs which amount to about 0.15 cents Argentine currency per kilo. At that time it was not difficult to obtain the export [495] permit.

To the Nineteenth Interrogatory, he says:

I have had experience in cancellation of contracts during my long commercial career; two kinds of situations may arise: When the contract has been done privately claims are submitted direct to the commercial courts. In the most common cases when there is a purchase and sale contract done on the official forms of the Bolsa de Comercio, the parties are obliged to appear before said institution in the first place. The procedure in the latter case is as follows: The plaintiff submits his claim in writing to the Bolsa de Comercio, the Bolsa sends a communication to the defendant, enclosing a copy of the claim, the latter is compelled to answer such

Plaintiff's Exhibit 60-C—(Continued)

claim; The Bolsa then summons both parties for a conciliation meeting; in case of failure to come to an agreement each party must appoint an arbitrator and establish the points to be solved by both arbitrators; when the arbitrators have accepted office they shall meet in order to appoint an umpire, whose decision shall be final in case both arbitrators do not agree. The arbitration court being thus formed all the antecedents are given to the arbitrators and the question is entirely left for them to decide. While this procedure takes place the merchandise, object of [496] the question cannot be touched by anyone, until the award is pronounced by the arbitrators. The arbitrators generally establish the difference existing between the contract price and the market value of the merchandise in which they determine the amount to be paid by one party to the other, or else they decide for the sale of the merchandise through a local broker and the difference is charged to the losing party. In case one of the parties does not fulfil the award, the Bolsa de Comercio applies a punity fine to the member, and/or excludes him from its list of members. In case of unfulfilment of one of the parties the other one may apply to the commercial courts in which an award of the Bolsa de Comercio arbitrators is generally enforced. As I have said at the beginning when the contract has not been done through the Bolsa de Comercio and goes direct to the commercial courts, the procedure is much longer and the

Plaintiff's Exhibit 60-C—(Continued)

merchandise, object of the question, is put at the disposal of the judges, who, after a procedure much longer than the one followed in the Bolsa de Comercio, generally decide for the sale of the merchandise.

Answers by Ricardo Horacio Gonzalez to
Cross-Interrogatories.

To the First Cross-Interrogatory (to Plaintiff's Interrogatory No. 2), he says: [497]

- (a) I am only an exporter of glucose.
- (b) I have always been an exporter and trader in domestic produce.

To the Second Cross-Interrogatory (to Plaintiff's Interrogatory No. 3), he says:

- (a) I have not been employed or acted as agent or broker of any of said firms, but I have had business relations with the plaintiff for about two years, and also with Sociedad Industrial Financiera Argentina, and Eugenio Lang.

(b) I have met Mr. Fred Berger of Cia. Engraw Comercial e Industrial S.A., Mr. Luis Dittsheim of SIFAR, and Juan Lang of Eugenio Lang. The nature and duration of the relationship has been answered under (a).

- (c) Already answered under (b).
- (d) Already answered under (b).

To the Third Cross-Interrogatory (to Plaintiff's Interrogatory No. 4), he says:

- (a) It is a private institution of traders created

Plaintiff's Exhibit 60-C—(Continued)

for the object of dealing with all questions relating to the purchases, sale, exchange and registration of products.

(b) There are only two.

(c) They are privately owned.

(d) Both associations are not competitive. [498]

To the Fourth Cross-Interrogatory (to Plaintiff's Interrogatory No. 5), he says:

(a) To my knowledge glucose is only manufactured from maize in Argentina. According to my estimation, the production attains 35 to 40,000 tons per annum.

To the Fifth Cross-Interrogatory (to Plaintiff's Interrogatory No. 6), he says:

(a) I again state that I only know of production of glucose from maize, the yearly production being, I believe, 35 to 40,000 tons, of which about 8000 have been exported during 1946, the balance being naturally stock on hand or domestic consumption.

To the Sixth Cross-Interrogatory (to Plaintiff's Interrogatory No. 9), he says:

(a) Commodity exchanges in Buenos Aires make no speculation on operations in glucose, which is sold privately. As to quality, there is only one, conforming to the given specifications, and produced from corn.

To the Seventh Cross-Interrogatory (to Plaintiff's Interrogatory No. 18), he says:

(a) In May 1947 we made only one sale of 20 tons for export to Uruguay.

Plaintiff's Exhibit 60-C—(Continued)

(b) Yes.

(c) It was meant for a candy manufacturer in [499] Montevideo, the merchandise was from our own stock, the amount of said sale was 12,000 pesos Argentine currency, the kind of glucose the one already described, packed in barrels 660 lbs and the price was 0.60 cents Argentine currency per kilo, F.O.B.

(d) Most of this has been answered under (c), as to the number of the export license I do not remember and it is not available to me at the moment.

/s/ CLARA ROBINE

Interpreter

/s/ R. H. GONZALEZ

RICARDO HORACIO

GONZALEZ

Witness

/s/ JONES R. TROWBRIDGE

Consul of the

United States of America

